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IN THE

Supreme Court of the United States

October Term, 1976

No. 76-379

VOLKSWAGEN OF AMERICA, INC. and VOLKSWAGEN PRODUCTS CORP.,

Petitioners,

vs.

CALNETICS CORPORATION, MEIER-LINE, INC., R.W.C. SALES CORPORATION, ROLF W. CHRISTIANSEN, WILLIAM R. SACHKO, PHILLIP BALLINGALL, D. C. HARDING, D. N. EMANUEL, R. S. BELLER and F. E. EDWARD,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners, Volkswagen of America, Inc. ("VW") and Volkswagen Products Corp. ("VPC"), respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on February 24, 1976.[1]

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[1] Calnetics Corporation and Meier-Line, Inc. have filed a petition for certiorari to review issues relating to the equitable aspect of their Section 7 claims, in particular, the right of a private Section 7 plaintiff to divestiture and attorneys' fees. *Calnetics Corp. and Meier-Line, Inc.* v. *Volkswagen of America, Inc. and Volkswagen Products Corp.*, No. 76-214. Their petition is being opposed by the Petitioners herein, Volkswagen of America, Inc. and Volkswagen Products Corporation, on the ground that these equitable issues are academic, hypothetical, and moot.

Opinions Below

During the course of this proceeding, in which five judgments were entered disposing of the various claims and counterclaims, the District Court signed three sets of "Findings of Fact and Conclusions of Law," and wrote two opinions (App. 1a-11a, 14a-70a).[2] Three of the five are reported at 348 F.Supp. 606; 348 F.Supp. 623; and 353 F.Supp. 1219. The opinion of the Court of Appeals for the Ninth Circuit (App. 71a-113a) is reported at 532 F.2d 674 (9th Cir. 1976).

Jurisdiction

The judgment of the Court of Appeals was entered on February 24, 1976; a timely petition for rehearing filed by petitioners herein was denied on May 17, 1976. On August 4, 1976, Mr. Justice Rehnquist extended petitioners' time for filing a petition for writ of certiorari to and including September 14, 1976. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1). Jurisdiction in the District Court was based on 15 U.S.C. §§ 15 and 26.

Questions Presented

In October 1968, a small, local California manufacturer of automobile air-conditioners, Calnetics, entered into a secret kickback arrangement with a major wholesale Volkswagen distributor's key employee, responsible for determining what air-conditioners that distributor would purchase for resale to its franchised dealers. As a result, the distributor bought air-conditioners exclusively from Calnetics, buying none from its former supplier, VW, the Volkswagen importer. In the fall of 1969, two events occurred: the suborned employee was discharged and VW acquired its air-conditioner supplier. Thereafter, the distributor resumed buying automobile air-conditioners from VW, but not exclusively, making heavy purchases from still a third supplier. Except for one substantial order for 1,500 units, the distributor bought nothing further from Calnetics, which then sued VW, claiming that it had lost the distributor's business due to VW's acquisition of its supplier allegedly in violation of Section 7 of the Clayton Act. VW cross-claimed, alleging that Calnetics' bribery violated the Robinson-Patman Act and local California law, and was part of a conspiracy to eliminate VW and its air-conditioner supplier from the distributor's market and to monopolize that market in violation of the Sherman Act.

[2] "App." refers to Petitioners' Appendix; "R." refers to the record on appeal; "Tr." refers to the transcript of the trial on a claim of violation of Section 7 of the Clayton Act; "PX" refers to Plaintiffs' Exhibits in that trial.

The following questions relate to the legal effect to be given Calnetics' commercial bribery on its claims and VW's cross-claims.

1. Did the court below err in dismissing VW's Sherman Act claims because commercial bribery was the means used to bring about the forbidden restraint and monopolization?

2. Was it error to enter summary judgment against VW on its Federal antitrust and state claims predicated on the diversion by Calnetics of the distributor's business through commercial bribery merely because VW enjoyed no net profit on the resale of automobile air-conditioners?

3. In an antitrust case, can the plaintiff, in order to establish its post-violation damages, project forward its pre-violation sales, or market share, even though swollen through plaintiff's illegal, commercial bribery?

4. Is a Section 7 Clayton Act plaintiff entitled to have a jury find injury and damages merely from the loss of the

business of a single customer to the Section 7 Clayton Act defendant, where such loss followed not only the challenged acquisition, but also the cessation of the plaintiff's bribery of the customer's key employee?

Statutes Involved

Section 1 of the Sherman Act, 15 U.S.C. §1 provides:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal * * *"

Section 2 of the Sherman Act, 15 U.S.C. §2 provides:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty * * *"

Section 2(c) of the Robinson-Patman Act, 15 U.S.C. §13(c) provides:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid."

Section 4 of the Clayton Act, 15 U.S.C. §15, provides:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

The first paragraph of Section 7 of the Clayton Act, 15 U.S.C. §18, provides:

> "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

STATEMENT

A. The Basic Facts

The claims and counterclaims involved in this proceeding all have their genesis in the shifting purchasing decisions made by Volkswagen Pacific, Inc. ("VPI" or "Distributor"). VPI, during the relevant period, was one of fourteen wholesale distributors franchised to buy and resell Volkswagen vehicles. Some of these distributors were VW subsidiaries, and some, like VPI at that time, were

wholly-independent enterprises. VPI did business in Southern California, Southern Nevada, Arizona, and Hawaii. (App. 46a-47a.)

Since at least 1963, VW, in order to make Volkswagen vehicles competitive with factory air-conditioned automobiles, has been buying hang-on air-conditioners (*i.e.*, air-conditioners that can be installed in vehicles after they have left the assembly line) from a Texas manufacturer, Delanair Engineering Company, Inc. ("Delanair," "VPC," or "Subsidiary"). When the relationship began, Delanair was a subsidiary of a large British conglomerate. As automobile air-conditioning became increasingly important to the sale of new vehicles, VW involved itself increasingly with Delanair, particularly in designing, selling, and servicing the Delanair product. By 1968 or 1969, Delanair, which originally had manufactured air-conditioners for a broad line of vehicles, had become, in effect, a captive supplier to VW. It manufactured units only for Volkswagen vehicles, while VW similarly confined its purchases to the Delanair product. (App. 20a-21a.)

Until the 1969 model year for Volkswagen vehicles, which began around October 1968, VPI, like the other Volkswagen distributors, bought automobile air-conditioners for Volkswagen vehicles almost entirely from VW. (App. 48a-49a.) Indeed, 80 percent, or more, of all automobile air-conditioners sold by Volkswagen distributors and dealers were manufactured by Delanair and distributed by VW. (App. 18a, n.4.)

Until the start of the 1969 model year, VW believed that it would continue to be supplying VPI with its automobile air-conditioners. (App. 49a-50a.) However, in October 1968, VW was advised that VPI would no longer buy its products. Instead it would sell exclusively the units sold by Calnetics. (App. 3a-4a, 19a, 50a.) Calnetics was a local

California company, and a newcomer to the large-scale mass manufacture of automobile air-conditioners. VPI switched to buying Calnetics air-conditioners in reliance on the recommendation of its service manager, Rolf W. Christiansen. Christiansen, unknown to VW or to his superiors at VPI, had negotiated an agreement for a 3 percent kickback to him by Calnetics on all sales made to VPI. The agreement, in writing, was entered into with a dummy corporation, R.W.C. Sales Corp., organized by Christiansen, and the commission payments were mailed to a post office box. (App. 19a, 51a-53a.) The effect of VPI's decision to purchase exclusively from Calnetics was to exclude VW's Delanair units from the area served by VPI (App. 54a).

The Calnetics air-conditioners sold under the tradename Meier-Line proved to be seriously defective and dangerous, leading to at least two fires in the vehicles in which they were installed. By the summer of 1969, every VPI dealer in Arizona, and several in Southern California, were refusing to accept any more Meier-Line units from VPI. (App. 4a)

Christiansen, collecting his secret profits from Calnetics,[3] refused, however, to acknowledge any deficiencies in the Calnetics units, and, in fact, in June 1969, committed VPI to purchase 10,000 units for the following model year, a number far in excess of VPI's total annual requirements. Dealer dissatisfaction with the unit, however, compelled VPI to retreat from this commitment. In October 1969, at the beginning of the 1970 model year, VPI announced that it would handle air-conditioner units manufactured by DPD,[4] another air-conditioner manufacturer from whom

[3] Between December 10, 1968 and September 17, 1969, Calnetics paid Christiansen, through R.W.C. Sales Corp., nearly $15,000 (App. 53a).

[4] The Court of Appeals identified this supplier as "Delta" (App. 73, n.3).

its dealers had theretofore been buying directly, as well as the Calnetics unit. (App. 5a, 20a, 54a.)

During the 1969 model year, while the arrangements between Christiansen and Calnetics were in effect, VW's efforts to sell Delanair air-conditioners were repeatedly rebuffed on the ground that VPI was handling Calnetics' units only. VW's sales to VPI dropped to almost zero. This was a significant loss for Delanair since a large share of all air-conditioners for Volkswagen automobiles sold in the United States were sold in the area served by VPI.[5]

By the end of the 1969 model year, Delanair, which nad been a prosperous concern, found itself facing financial disaster due to the decline in VW's sales of Delanair units to VPI and other Volkswagen distributors (App. 21a). As losses mounted and the cash flow proved insufficient to meet current obligations, Delanair's British parent sought unsuccessfully to find a buyer for the firm (App. 22a-23a). Delanair's collapse would have left VW without warranty and service backup for the large number of Delanair units already installed in VW automobiles, and without a supplier capable of manufacturing an essential accessory in sufficient quantity for the model year just then beginning. Concerned by this prospect, VW accepted Delanair's request that VW take over the company. The acquisition was consummated on September 26, 1969. Delanair was renamed "Volkswagen Products Corporation." (App. 24a.)

When VPI shortly thereafter announced that, during the coming year, VW's product was again going to be excluded from the lucrative VPI territory, VW's Vice President in charge of parts sought reconsideration. The best that he was able to obtain was a promise that in addition to those products which VPI was already carrying, it would give a token order for the VW product on condition that VW would take its units back if they could not be sold or were unsatisfactory. (App. 5a)

[5] According to undisputed figures in the record, approximately 15 percent of all such air-conditioners were sold in 1968 in the territory in which VPI did business.

On November 1, 1969, Christiansen was summarily discharged by VPI and Calnetics promptly cut him off its own payroll.

The sales Christiansen had steered to Calnetics proved to be its financial undoing. Its automobile air-conditioning business lost over $300,000 in 1969. (Tr. 1593). After persuading VPI on November 14, 1969 to give it an order for 1,500 units (R. 637), Calnetics called a meeting of its creditors at which it publicly revealed its insolvent condition. This revelation made its units harder to sell since it meant that there would be no responsible company to pay warranty claims, an inescapable requirement in the sale of any complex mechanical product. Confronted with its dealers' unwillingness to purchase Calnetics units, VPI unsuccessfully sought to avoid its commitment to purchase 1,500 units (Tr. 579-80, R. 544).

That order was the last one Calnetics received—or, apparently sought—from VPI. Neither then, nor later, did Calnetics seek business from any other Volkswagen distributor. (Tr. 1699-1701.) It took VPI the balance of the 1970 selling season to resell the units bought from Calnetics. After filling VPI's 1,500-unit order, Calnetics limited itself to converting the inventory it had on hand into completed units which it sold directly to dealers—Volkswagen as well as dealers of competing brands—losing nearly $200,000 in 1970. (Tr. 192-195, 1602-1603.)

During the 1970 model year, VPI bought 4,225 units from DPD and 2,024 units from VW, and thereafter continued to purchase from these two companies. (PX 367A)

B. The Proceedings Below

In September 1970, Calnetics sued VPI, VW, and VPC on the theory that it had lost VPI's business due to a conspiracy in violation of Sections 1 and 2 of the Sherman Act, and, in particular, due to VW's acquisition of its captive supplier, which Calnetics claimed violated Section 7 of the Clayton Act. Damages and equitable relief were requested. During the course of discovery, the secret kickback arrangement with Christiansen was discovered, leading VW and VPC to counterclaim under the Sherman Act (15 U.S.C. §§ 1, 2), Section 2(c) of the Clayton Act as amended by the Robinson-Patman Act (15 U.S.C. § 13 (c)), and under California law proscribing unfair competition and interference with business relations.[6]

[6] Their counterclaim read in part:

"11. Beginning * * * about 1968, * * * and continuing through and including the year 1970, cross-defendants and other co-conspirators * * * conspired * * * to restrain interstate trade and commerce and attempted to monopolize interstate trade and commerce in the distribution and sale of air conditioning systems for Volkswagen and Porsche automobiles in Southern California, Arizona, Southern Nevada and Hawaii, in violation of Sections 1 and 2 of the Sherman Act.

"12. In furtherance of said * * * conspiracy, cross-defendants * * * entered into a plan and program to interfere with, impair and eliminate cross-claimants as competitors * * *. More particularly cross-defendants * * * performed numerous acts to prevent and foreclose cross-claimants from selling air conditioning systems to VPI and dealers in Volkswagen and Porsche automobiles in Southern California, Arizona, Southern Nevada and Hawaii, including the following:

* * *

"(b) CALNETICS bribed CHRISTIANSEN, BALLINGALL and other employees of VPI, whose names are presently unknown to cross-claimants, to use their position at VPI to induce VPI and VPI dealers to purchase all or substantially all of their air conditioning system requirements from CALNETICS to the exclusion of all other manufacturers and distributors of such air conditioning systems, including cross-claimants." (App. 117a-118a).

Ultimately, all the various claims and counterclaims, except Calnetics' claim that VW's acquisition of Delanair violated Section 7 of the Clayton Act, were disposed of through summary judgment (App. 74a).[7]

At the plenary Section 7 trial, essentially the facts recited earlier were established, except those relating to Calnetics' commercial bribery. Calnetics claimed damages causally related to the acquisition on the theory that had it been competing solely with DPD in 1970 and 1971, it would have supplied VPI with 60 percent of the air-conditioners that firm actually bought in those years. At the conclusion of the plaintiff's affirmative case, the trial court directed a verdict in favor of VW solely with respect to damages, and dismissed the jury. Ultimately, the court, sitting as the trier of facts on Calnetics' equitable claims, held, that the acquisition of Delanair by VW violated Section 7. In reaching that conclusion, the court relied exclusively on the statistical evidence that VW's sales (and its percentage shares of such sales) had increased in the post-acquisition period. The district court ordered not only divestiture, but drastic equitable relief (App. 57a, 58a, 62a-64a).

On appeal, the Ninth Circuit disapproved the directed verdict at the close of plaintiff's case, and reversed all the summary judgments except those entered on VW's and VPC's counterclaims (App. 72a-74a). It remanded for re-

[7] Because the summary disposition of Calnetics' claims against VPI played no part in the trial court's disposition of the claims involving Petitioners, the facts relevant to them are not discussed herein.

trial all the claims and counterclaims except those as to which it affirmed summary judgment. Included among those remanded were plaintiffs' Section 7 claims.

(1) *The Summary Judgment on VW's and VPC's Counterclaims Based on Commercial Bribery.*

At the trial level, Calnetics had sought summary judgment on Petitioners' counterclaims on the ground that a Sherman Act violation could not be grounded on commercial bribery. Although the trial court disagreed, it nevertheless entered summary judgment on factual grounds: (1) That VPI's decision to discontinue its purchases of Delanair products was not "causally related" to the written Calnetics-Christiansen kickback agreement; and (2) That VW could claim no damages because it had not realized any net profit on its resale of Delanair units after deductions for engineering and promotional expenses (App. 11a).

Disagreeing with the District Court on the first ground, the Court of Appeals concluded that a factual issue was presented respecting the relationship between the commercial bribery and the decision by VPI to discontinue handling VW's Delanair air-conditioners: "The exact sequence of events in the summer and fall of 1968 and the effect of the commission agreement are not so clearly established in the documents on file that a jury trial is unnecessary." (App. 90a). Nevertheless, it affirmed the grant of summary judgment against VW on the trial court's alternative factual ground that VW had made no net profit on its resale of Delanair air-conditioners and thus was precluded from claiming damages under both Federal and state law (App. 93a). This conclusion, however, could dispose only of VW's counterclaims, not of Subsidiary's, since it had never been contended that Subsidiary (Delanair-VPC) made no profit on the sale of its air-conditioners.

The appellate court was thus compelled to reach the question of the legal sufficiency of Subsidiary's claims for damages predicated on commercial bribery. It reversed the District Court insofar as the claims under the Robinson-Patman Act and California law were concerned,[8] but affirmed the dismissal of the Sherman Act claims on the ground, rejected by the trial court, that "commercial bribery, standing alone, does not constitute a violation of the Sherman Act." (App. 92a).

(2) *The Summary Judgment on Calnetics' Sherman Act Claims Against VW and VPC.*

The Ninth Circuit also disagreed with the trial court's holding that Calnetics' 1969 sales, secured through commercial bribery, cannot be used as the basis for projecting damages in 1970 and 1971 (App. 94a). The Court of Appeals took this position despite the fact that elsewhere in its opinion it reaffirmed that such commercial bribery may violate Section 2(c) of the Robinson-Patman Act (App. 93a). In the trial court, summary judgment had been entered against Calnetics on its Sherman Act claims after it stipulated that "its sole theory of damages is predicated upon a projection based upon its sales during the 1969 model year, all of which sales occurred during the operating period of the Christiansen-Calnetics agreement" (App. 54a-55a). The Ninth Circuit, denying that it was "giving a green light to companies to violate the law against commercial bribery," (App. 97a) rejected, as obsolete, the principle that "profits made in the 'before' period, when plaintiff was the

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[8] The court's discussion of the Robinson-Patman Act issue appears not in the context of Subsidiary's counterclaim, but at a later point in the opinion dealing with Distributor's counterclaims (App. 91a-92a). However, the chart of the causes of action and disposition at the beginning of the opinion confirms that "Summary judgment for Calnetics on Subsidiary's non-Sherman Act counterclaims was vacated and remanded." (App. 47a, n.3)

beneficiary of the unlawful acts, are not proper evidence on which to predicate lost profits in the 'after' period'' (App. 96a, n.23). Remanding all Calnetics' antitrust claims for trial, the Ninth Circuit made clear that Calnetics may predicate its damages on its 1969 sales, even if these sales are found to have been the fruit of ''illegal'' conduct (App. 89a, n.16, 97a).

(3) *The Directed Verdict on Calnetics' Section 7 Damage Claims.*

The appellate court also reversed the directed verdict in favor of VW on plaintiff's Section 7 damage claims, saying that it could stand only "if no reasonable jury could have found that Subsidiary was responsible for *any* of plaintiff's alleged losses" (App. 86a). Viewing the evidence in the light most favorable to Calnetics, the Court of Appeals was of the view that a jury could have found "some of Subsidiary's sales to Distributor for the 1970 and 1971 model years were made only as a result of conspiratorial conduct[9] and were made at the expense of Calnetics. Further, even if a jury were to conclude that Subsidiary did not foreclose Calnetics from the Distributor market in the months immediately following the acquisition, we cannot say that no jury could have found an unlawful foreclosure commencing at a later time.'' (App. 87a-88a). The court added, however, that "a jury finding that Distributor made an independent, *long-term* business judgment to cease doing business with plaintiff would defeat each and every one of plaintiff's damage claims'' (Emphasis by court.) (App. 85a, n.13).

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[9] Two possible conspiracies were suggested by the Court of Appeals: (1) "That Distributor participated in a conspiracy in restraint of trade which resulted in a decision to terminate dealings with plaintiff"; or (2) "That Distributor's initial decision to drop Calnetics was for independent business reasons, but that once Subsidiary was rehabilitated, the unlawful foreclosure commenced and Calnetics was prevented by the conspiracy from reentering the market." (App. 84a.)

ARGUMENT

Introductory Statement

Few practices are more destructive of the free competitive market, which the antitrust laws are designed to protect, than commercial bribery. Inferior products are thereby imposed on the marketplace, products which must then be sold at higher prices to cover the hidden handouts. Not only consumers, but competitors suffer. Business is diverted from other sellers, causing them loss of profits at the minimum, and driving them into failure at the maximum. Commercial bribery thus brings about the evils the antitrust laws are designed to combat: higher prices, inferior products, and the elimination of competition.

Petitioners were prepared, but not allowed to prove, that Calnetics had subverted free and open competion for automobile air-conditioners in Southern California in exactly this way, and to their damage. It is undisputable that Calnetics obtained the exclusive business of VPI, VW's Southern California wholesale distributor, by paying kickbacks to a key employee; that the products sold by Calnetics were defective and dangerous; that, due in part to the loss of VPI's business, Delanair was forced into a loss position which would have eliminated it from the marketplace, except that its selling partner, VW, came to its rescue by taking over its losses.

Petitioners have charged that the bribery and diversion of the California distributor's business were all part of a conspiracy in violation of the Sherman Act to restrain interstate trade. That it did not ultimately succeed is due to the fact that Calnetics' operations were so inefficient

that it derived no profit from its sales to VPI, which, in fact, drove it into insolvency, and that its product was so inferior that even bribery could not exclude competition for very long.

The Ninth Circuit has announced a series of principles which would insulate such destruction of the marketplace from sanctions at the suit of competitors, or even the government, and which would lend the aid of the courts to legitimize and reward the fruits of such misconduct. As we shall show, these principles are inconsistent with the overall structure of the antitrust laws, are detrimental to public policy, and in conflict with decisions of other courts of appeals, and this Court.

I.

The holding of the Court of Appeals for the Ninth Circuit, that trade restraints and monopolization grounded in commercial bribery can never violate the Sherman Act, erroneously grafts an indefensible exception on the comprehensive language of the Act, undermines the antitrust laws, is incompatible with settled principles, and will breed further error unless corrected by this Court.

Although the court below apparently believed it was following precedent in holding that a claim for relief under Sections 1 and 2 of the Sherman Act cannot be based on conduct motivated by commercial bribery, in fact it was making new law, and, in the context of this case, putting itself in square conflict with the First Circuit. The cases cited by the court hold no more than that the particular bribery involved did not result in the type of misconduct prohibited by the antitrust laws. *United States* v. *Boston & Maine Railroad,* 380 U.S. 157, 162 (1965);

Norville v. *Globe Oil & Refining Co.,* 303 F.2d 281, 282-83 (7th Cir. 1962); *Sterling Nelson & Sons, Inc.* v. *Rangen, Inc.,* 235 F.Supp. 393, 400 (D. Idaho 1964), *aff'd on other grounds,* 351 F.2d 851 (9th Cir. 1965), *cert. denied,* 383 U.S. 936 (1966). Commercial bribery, like other tortious or criminal conduct, does not inevitably or necessarily involve a restraint on competition, nor rise to the level of attempted monopolization. "The Sherman Act does not purport to afford remedies for all torts committed by or against persons engaged in interstate commerce." *Hunt* v. *Crumboch,* 325 U.S. 821, 826 (1945); *United States* v. *Boston & Maine Railroad Co., supra; Apex Hosiery Co.* v. *Leeder,* 310 U.S. 469, 512-13 (1940). But that commercial bribery and violation of the Sherman Act are not coterminous does not make them mutually exclusive. That is the basic error in the holding below.

Petitioners' complaint did not charge mere bribery, pure and simple. It alleged that Calnetics, together with Christiansen and other unknown conspirators, had conspired "to restrain • • • and attempted to monopolize interstate trade and commerce in the distribution and sale of air conditioning systems for Volkswagen and Porsche automobiles in Southern California, Arizona, Southern Nevada and Hawaii, in violation of Sections 1 and 2 of the Sherman Act"; that, as part of this conspiracy, they "entered into a plan and program to interfere with, impair and eliminate cross-claimants [Petitioners] as competitors"; and, as part of this claim, had engaged in commercial bribery. Since the complaint was dismissed for failure to state a claim, its allegations must be taken at face value. *California Motor Transport Co.* v. *Trucking Unlimited,* 404 U.S. 508, 515 (1972).

That exclusion "from competition for the sale of automobile air conditioning equipment to Distributor [VPI]"

constitutes a restraint of trade cognizable under the Sherman Act, is assumed without question by the court below in evaluating Calnetics' Sherman Act claims against VW. The opposite result with respect to VW's identical charges was reached squarely on the ground that "commercial bribery, standing alone, does not constitute a violation of the Sherman Act" (App. 92a).

Thus, the Ninth Circuit would immunize a prohibited end-result, a restraint on interstate trade or a monopoly, if the means employed to reach that end involve commercial bribery. Under this view, commercial bribery, which violates the law of a majority of states, would receive an antitrust immunity which this Court has denied to restrictive private conduct even where engaged in with "state authorization, approval, encouragement, or participation." (Footnotes omitted). *Cantor* v. *Detroit Edison Co.*, —— U.S. ——, 96 S.Ct. 3110, 3118 (1976), and cases there cited. It would confer an absolute license which this Court has denied even to conduct involving exercise of First Amendment rights. That such rights are involved, this Court has held, does not create antitrust immunity where defendants' conduct is an integral part of a conspiracy having, as its aim and purpose, "putting their competitors, including plaintiff, out of business, of weakening such competitors, and of destroying, eliminating and weakening existing and potential competition, and of monopolizing the highway common carriage business in California and elsewhere." *California Motor Transport Co.* v. *Trucking Unlimited, supra,* 404 U.S. at 511. How can commercial bribery be given greater antitrust immunity than conduct enjoying a degree of First Amendment protection?

On the facts in this case, the result reached below is in square conflict with decisions of other Federal courts. Commercial bribery is a form of competitive tort, distinguished if at all from other forms of unfair competition only by being more reprehensible. Whether or not unfair competitive practices by a defendant, which is a significant factor in the market, accompanied by intent to drive a competitor out of business, constitutes a *per se* violation of the Sherman Act, as was once the view of the First Circuit, the courts are in agreement that, at least, such practices are to be tested in the same way as any other restrictive practice, *i.e.*, by the Rule of Reason, when challenged under Section 1, and under the criteria appropriate to Section 2, when monopolization is alleged. *George R. Whitten, Jr., Inc.* v. *Paddock Pool Builders, Inc.*, 508 F.2d 547, 559-62 (1st Cir. 1974), *cert. denied,* 421 U.S. 1004 (1975); *Tower Tire & Auto Center, Inc.* v. *Atlantic Richfield Co.*, 392 F.Supp. 1098 (S.D. Tex. 1975); *Associated Radio Service Co.* v. *Page Airways Inc.*, 1976 Trade Cases ¶ 60,971 (N.D. Tex. 1976); *Mar Food Corp.* v. *Doane,* 405 F. Supp. 730 (N.D. Ill. 1975).

By contrast, the Ninth Circuit has adopted the equivalent of a rule of *per se* antitrust legality: If a restraint of trade or attempted monopolization incorporates commercial bribery, it lies outside the Sherman Act. There is no justification either in principle or precedent for grafting such an exception on the all-embracing prohibitions of the statute designed "to make sure that no form of contract or combination by which an undue restraint of interstate or foreign commerce was brought about could save such restraint from condemnation." *Standard Oil Co. of New Jersey* v. *United States,* 221 U.S. 1, 59-60 (1911).

II.

In entering summary judgment on VW's antitrust and other causes of action because of the absence of net profits, the Ninth Circuit erred with respect to a recurring and significant issue.

Although the Ninth Circuit held that Calnetics' illegal arrangement with Distributor's key employee, Christiansen, would not support Sherman Act claims (App. 92a), it recognized that an action would lie under Section 2(c) of the Robinson-Patman Act and California law (App. 92a, 94a). Nevertheless, it affirmed the summary judgment against VW entered by the trial court on all VW's causes of action, state as well as Federal, predicated on Calnetics' misconduct, on the ground "that VW could not establish any damages flowing from the alleged Christiansen-Distributor commission agreement." (App. 93a.) In the view of the Ninth Circuit, summary judgment was appropriate because VW's president had testified "that VW's expenses in distributing Subsidiary units would 'eat up' any anticipated profit resulting from buying the units at one price and reselling them at a higher price,'"[10] and "VW has failed to point to any evidence tending to show that a genuine issue exists as to VWs damages." (App. 93a).

But VW was not required to point to, or produce, any evidence unless that on which Calnetics relied, viewed in the light most favorable to VW, showed the absence of a genuine issue concerning a material fact. "Where the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied *even if no opposing evidentiary matter is presented.*" ADVISORY COMMITTEE NOTE ON 1963 AMENDMENT TO SUBDIVISION *(E) of Rule 56,* quoted in *Adickes* v. *Kress & Co.,* 398 U.S. 144, 160 (1970) (Emphasis added by this Court). "No defense to an insufficient showing is required." 6 Pt. 2 MOORE, FEDERAL PRACTICE, ¶ 56.22[2], at 56-1344 (2d Ed. 1976).

[10] VW's President identified the expenses which were balancing out profits as "[g]eneral assistance in the engineering, quality control, perhaps assistance in printing of catalogues, or material, this type of thing." (R. 1448-1449).

That in reselling Delanair units VW made no net profit did not negate damages either under antitrust or local law. The expenses referred to by VW's President are in the nature of "fixed costs," *i.e.,* costs which remain the same regardless of volume; the smaller the volume, the less likelihood there is for their recapture, so that net profits either drop, or losses increase.[11] In either event, there is a legally compensable injury. *Vitex Mfg. Corp.* v. *Carbitex Corp.,* 377 F.2d 795, 798-99 (3d Cir. 1967); *Distillers Distributing Corp.* v. *J. C. Millett Co.,* 310 F.2d 162, 164 (9th Cir. 1962); *Automatic Vending Co.* v. *Wisdom,* 182 Cal. App. 2d 354, 358, 6 Cal. Rptr. 31, 33-34 (1960); *Dallman Co.* v. *Southern Heater Co.,* 262 Cal. App. 2d 582, 596, 68 Cal. Rptr. 873, 881 (1968); *Oakland California Towel Co.* v. *Sivils,* 52 Cal. App. 2d 517, 520, 126 P.2d 651, 652 (1942); 23 Cal. Jur. 3d, *Damages* § 82, at 165-66.

In insisting on the existence of net profits as a condition precedent to antitrust recovery, the Ninth Circuit has adopted a rule bound to be destructive of many meritorious treble damage suits. The small company, put out of business before it could ever show a profit and most

[11] This point was made by VW's counsel even as Mr. Perkins' testimony was being given: "In your rationale, you are omitting the basic facts if you are costs [sic] remain constant and your sales drop in an area such as Volkswagen Pacific, your losses increase because you are unable to make up your costs." (R. 1448).

victimized by the antitrust violator, would find itself out of court because its balance sheet showed a net loss.

The Ninth Circuit has placed itself in square conflict with the Fifth Circuit, which holds that the absence of profits will not defeat antitrust recovery:

> "To deny recovery to a businessman who has struggled to establish a business in the face of wrongful conduct by a competitor simply because he never managed to escape from the quicksand of red ink to the dry land of profitable enterprise would make a mockery of the private antitrust remedy." *Terrell* v. *Household Goods Carriers' Bureau,* 494 F.2d 16, 23 n.12 (5th Cir. 1974), *cert. dismissed,* 419 U.S. 987 (1974); quoted in *Lehrman* v. *Gulf Oil Corp.,* 500 F.2d 659, 669 (5th Cir. 1974), *cert. denied,* 420 U.S. 929 (1975).

VW lost sales and profits as a result of Calnetics' illegal activities, and its right to damages should not have been cut off at the roots by summary judgment because the enterprise in question had not escaped "from the quicksand of red ink to the dry land of profitable enterprise."

III.

The holding by the Court of Appeals for the Ninth Circuit that an antitrust plaintiff can project forward sales swollen by its own antitrust violations to prove its damages from defendants' subsequent misconduct is erroneous, contrary to public policy, and involves a recurring and important antitrust issue.

The court below has ruled, as a matter of law, that damages secured in violation of law, even of the antitrust laws, may serve as the measure of the sales that Calnetics would have continued to enjoy, but for the later violations of the antitrust laws by Petitioners. "Plaintiff", it has declared, "may base damage figures on 1969 model year sales, even assuming *arguendo* that these were 'illegal' sales." (App. 89a, n.16). Reversing the summary judgment entered in favor of Petitioners on Calnetics' stipulation that it has no other method of establishing its Sherman Act damages,[12] the court below remanded these claims for retrial, at which Calnetics will be permitted to use its 1969 sales to Distributor, the fruit of its commercial bribery, as the measure of the sales it would have made to this same customer in 1970 and subsequent years, but for Petitioners' alleged misconduct (App. 97a).

Damages in an antitrust case lie in the difference between what actually occurred, *i.e.*, the sales or profits that, in fact, were made in the market affected by the trade

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[12] The Ninth Circuit buttressed its reversal by asserting that the trial court had also erred on factual grounds because "a genuine issue of material fact exists as to the cause-and-effect relationship between the Christiansen commission agreement and Calnetics' sales to Distributor during the 1969 model year." (App. 94a). In fact, the evidence is unambiguous that Calnetics, during the entire period it enjoyed Distributor's exclusive business, was paying bribes in violation of the Robinson-Patman Act. (R. 148, 771).

restraints or other violations, and what would have taken place, *i.e.*, what sales or profits would have been made in a freely-competitive market. *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U.S. 359 (1927); *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555 (1931); *Bigelow* v. *R.K.O. Radio Pictures*, 327 U.S. 251 (1946). One of the several acceptable methods of proving what would have occurred under "freely-competitive conditions" (*Bigelow* v. *R.K.O. Radio Pictures, id.*, 327 U.S. at 264) is by reference to plaintiff's own performance either at a different time (*Eastman Kodak Co.* v. *Southern Photo Materials Co., supra; Story Parchment Co.* v. *Paterson Parchment Paper Co., supra; Bigelow* v. *R.K.O. Radio Pictures, supra*), or in a different place (*Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100 (1969).[13]

Until now, however, no court has ever questioned the test of damages, recognized more than a half century ago by the Second and Third Circuits, that a period itself distorted by antitrust violations, of which plaintiff was the beneficiary, cannot be used as a measure of damages. *Victor Talking Machines* v. *Kemeny*, 271 F. 810, 819 (3d Cir. 1921); *Eastman Kodak Co.* v. *Blackmore*, 277 F. 694, 699 (2d Cir. 1921). *Accord: Eastman Kodak Co.* v. *Southern Photo Materials Co., supra; Farmington Dowel Products Co.* v. *Forster Manufacturing Co.*, 421 F.2d 61, 82 n.48

[13] At the Section 7 plenary trial, Calnetics attempted to use another accepted method of proving damages: expert testimony. *E.g., William H. Rankin Co.* v. *Associated Bill Posters*, 42 F.2d 152 (2d Cir. 1930), *cert. denied*, 282 U.S. 864 (1930). That this is an appropriate way to establish a prospective purchasing decision of a single firm (VPI) is dubious at best, but, in any event, it was quickly established that Calnetics' expert had no basis other than "optimism" for his grandiose projections. (Tr. 1737) No doubt, it was for this reason that when Calnetics' Sherman Act claims subsequently were scheduled for trial, its counsel stipulated that he had no way of proving damages, except by reliance on the "before-and-after" method, using its 1969 record as the "before" period.

(1st Cir. 1970). To quote Timberlake, a leading commentator: "[P]rofits made in the 'before' period when plaintiff was the beneficiary of the unlawful acts are not proper evidence upon which to predicate lost profits in the 'after' period." E. Timberlake, Federal Treble-Damage Antitrust Actions, § 21.10 at 326 (1965).

The reasons for the rule are obvious. First, as a matter of simple evidence, a period itself distorted by wrongdoing cannot serve as a measure of what would have occurred in freely-competitive conditions. Second, to permit damages, and, in particular, treble-damages, to be based on projecting ill-gotten gains forward, would make the court a party to the original wrongdoing by using the judicial machinery to perpetuate its fruits. It is a basic principle of our jurisprudence that the courts will not lend their aid to making effective agreements in violation of the antitrust laws. *Continental Wallpaper Co.* v. *Louis Voight & Sons, Co.*, 212 U.S. 227, 262 (1909); *Associated Press* v. *Taft Ingalls Corp.*, 340 F.2d 753, 769 (6th Cir. 1965), *cert. denied*, 382 U.S. 820 (1965).

Perma-Life Mufflers v. *International Parts Corp.*, 392 U.S. 134 (1968), has in no way eroded these principles, nor detracted from the cogency of Timberlake's logic. *Perma-Life* deals with standing, the right to sue;[14] what is here involved is a rule of evidence, respecting proof of damages.[15] The difference between the two emerges most

[14] For the same reason, the other cases relied on by the Ninth Circuit (*Purex Corp.* v. *General Foods Corp.*, 318 F.Supp. 322 (C.D. Cal. 1970); *Semke* v. *Enid Automobile Dealers Ass'n*, 456 F.2d 1361 (10th Cir. 1972); *Adolf Coors Co.* v. *A & S Wholesalers, Inc.* 1975-1 Trade Cases ¶ 60,187 (D. Colo. 1975)) are inapposite.

[15] Although the issue is one of evidence, it does not relate to the "admissibility" of Calnetics' 1969 figures, as the Ninth Circuit seems to suggest (App. 96a). These figures were admitted without question in the Section 7 proceeding which preceded the Sherman Act sum-

clearly in the jury instructions in the landmark case *Eastman Kodak Co.* v. *Southern Photo Materials Co., supra.* There, the jury was first instructed that the plaintiff "could not recover any damages whatever" if plaintiff was *in pari delicto.* The second branch of the instruction dealt with the evidentiary point here involved, *i.e.,* how damages were to be ascertained should the jury conclude that plaintiff was *not in pari delicto:*

> "* * * [F]urther, that even if the plaintiff had not been a party to the monopoly, it could not recover damages on the basis of the profits which it had earned while a customer of the defendant *to the extent that they had been increased by the monopoly and exceeded those in a normal business,* but that they must be reduced to the basis of normal profits." (Emphasis added.) 273 U.S. at 377.

Perma-Life has made the first instruction incomplete, if not wholly erroneous, but has left the second untouched. Neither the *pari delicto* doctrine nor the repudiation of that doctrine in *Perma-Life,* bears on the legal effect of a plaintiff's antitrust violations unrelated to, and even preceding, defendant's claimed wrongdoing. Neither has any application to the narrow question here involved: whether inflated sales secured through misconduct in which defendants played no part, but, in fact, of which they were the victims, can be received as evidence of what would have occurred in a freely-competitive market.

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mary judgment. What the trial court said in its opinion entered at the end of the Section 7 proceeding, and which precipitated the motion for summary judgment, was that because of their source, these figures were "excludable in any consideration of the damage issue." (App. 19a, n.7). In other words, while these figures were acceptable as evidence, they were unacceptable as proof of what Calnetics would have sold in subsequent years, but for Petitioners' alleged wrongdoing.

That the court below believed *Perma-Life* permits such use of illegal sales reflects and compounds the confusion in the lower Federal courts regarding the extent to which antitrust violators are to be excused, or even rewarded, for their misconduct.

Clarification and correction by this Court of this erroneous view of *Perma-Life* is needed to prevent further erosion of the antitrust laws, and to ensure their respect by all companies, small as well as large.

IV.

In holding that proof of a change in VPI's business following VW's acquisition of its supplier entitled Calnetics to go to the jury on its Section 7 claims, and ignoring the factual and legal significance of Calnetics' commercial bribery on such shift, the Ninth Circuit has erroneously excused a Section 7 plaintiff from the causality proof required by Section 4.

During the period Calnetics had VPI's key employee on its payroll, that distributor's business decisions were not based on free competition in the marketplace. Normal competitive forces could not re-emerge until the bribery ceased and after its effects on the marketplace had had time to dissipate. It is to be expected that when they did, Calnetics, which had previously enjoyed a preferred position as a result of bribery, would lose sales, while its competitors, VW and DPD, would regain some or all of the market position of which they had been deprived by the corruption of the marketplace.[16]

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[16] In fact, a buyer's division of business, after bribe-taking has ended, has been accepted as evidence of the damage done the wrongdoer's competitors by its interference with the marketplace. *Rangen, Inc.* v. *Sterling Nelson & Sons, Inc.,* 351 F.2d 851, 855 (9th Cir. 1965), *cert. denied,* 383 U.S. 936 (1966).

This is exactly what occurred here. When Calnetics was no longer able to subvert VPI's employees, it lost first part, then all, of VPI's business, while VW regained some share of the business which, before the bribery, had belonged to it entirely. Yet, the court below has ruled that because VW changed the character of its supplier, from a captive independent to a subsidiary, VW may be liable to Calnetics for treble damages unless it can satisfy a jury that VPI "made an independent, *long-term* business judgment to cease doing business with" Calnetics (App. 85a, n.13). The Ninth Circuit, like the Third Circuit, appears to embrace the view that the competitor of a company, which has allegedly made an acquisition in violation of Section 7, may recover damages under Section 4 of the Clayton Act, (15 U.S.C. § 15) merely by showing "injury in fact causally related to the violator's presence in the market, whether or not that injury flows from or results in an actual lessening of competition." *NBO Industries Treadway Cos., Inc.* v. *Brunswick Corp.*, 523 F.2d 262, 273 (3d Cir. 1975), *cert. granted sub nom, Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 424 U.S. 908 (1976).[17]

That this is the Ninth Circuit's view was shown most clearly by its reversal of the directed verdict entered in favor of VW at the close of plaintiff's Section 7 proof. Viewing that evidence most favorably to Calnetics, it establishes only that in the year following the acquisition, Calnetics sold less to VPI than it had sold, or had expected to sell, prior to such acquisition, and that both VW and DPD sold more. There was no probative evidence that had VPI bought less from VW, it would have bought more from Calnetics. On the contrary, it was incontrovertibly established that after VPI had unsuccessfully sought release from its commitment to buy the 1,500 units from Calnetics, it took VPI the balance of the model year to persuade its dealers to buy these units from it. Not only was there no evidence that VPI could have sold any more of Calnetics' units than it, in fact, bought, there was likewise no evidence that Calnetics had sought any business from VPI subsequent to the 1,500-unit order.

[17] The Ninth Circuit's references to "conspiracy" (*supra*, p.14 n. 9) do not provide a ground for distinction. "Conspiracy" is only a pejorative term describing an agreement. To quote an opinion of Judge Marvin Frankel in another connection: "At some time before October 15, 1965, the complaint continues, the individual defendants agreed ('entered into a combination, understanding, concert and conspiracy') to set up their own business * * *." *Vogue Instrument Corp.* v. *Lem Instruments Corp.*, 40 F.R.D. 497, 498 (S.D.N.Y. 1966). Since there is no doubt that VPI agreed to purchase VW's units as a result of the visit paid VPI by VW's vice-president in charge of parts, it necessarily entered into a "conspiracy" to buy VW's products.

Calnetics offered no evidence that its claimed injury resulted "directly from the specific anticompetitive consequences proscribed by Section 7 itself, *i.e.*, 'lessened competition or monopoly itself'" (*Pandola* v. *Texaco Inc.*, 1975-1 Trade Cases ¶ 60,232 at 65,931 (C.D. Cal. 1975); *Dole Valve Co.* v. *Perfection Bar Equipment, Inc.*, 311 F.Supp. 459, 462 (N.D. Ill. 1970)), nor that its alleged damages were "the economic result of the *anti-competitive* effects" of the acquisition. *GAF Corp.* v. *Circle Flooring Co.*, 463 F.2d 752, 759 (2d Cir. 1972), *cert. dismissed*, 413 U.S. 901 (1973) (emphasis in original). In reversing the directed verdict entered on this record, the Ninth Circuit has come full circle from the decisions denying that any private Section 7 damage suit will lie because of the difficulty of proving the *fact* of causally-related injury from possible future anticompetitive effects, to reading out of such a Section 7 action the need for proving just this *fact*. *Cf. Gottesman* v. *General Motors Corp.*, 414 F.2d 956 (2d Cir. 1969); *Story Parchment Co.* v. *Paterson Parchment Paper Co., supra*, 282 U.S. 555 (1931); *Bigelow* v. *R.K.O. Radio Pictures, Inc., supra*, 327 U.S. 251 (1946); Areeda,

Antitrust Violations Without Damage Recoveries, 89 HARV. L. REV. 1127 (1976). The Ninth Circuit is imposing a harsher rule on a Section 7 defendant than on a Section 2 monopolist, since even an adjudicated monopolist does not thereby become liable for "every business casualty" in the monopolized market. *Monticello Tobacco Co.* v. *American Tobacco Co.,* 197 F.2d 629, 631 (2d Cir. 1952), *cert. denied,* 344 U.S. 875 (1952).

In this case, the failure to show a causal connection between the claimed anticompetitive consequences proscribed by Section 7 and Calnetics' claimed injury (*i.e.,* the loss of some of VPI's business), is aggravated by the disregard of the court below for the legal and factual significance of Calnetics' commercial bribery and its effect on the market, and, in particular, on VPI's purchasing decisions. The inevitable result must be to hold VW liable in treble damages because Calnetics was unable, once it was no longer able to bribe VPI's employees, to retain the preferred position it had secured in violation of law. Even if it had been demonstrated that "some of Subsidiary's sales to Distributor for the 1970 and 1971 model years were made only as the result of conspiratorial conduct, and were made at the expense of Calnetics" (App. 87a), since there was no way of separating such lost sales from those lost by Calnetics due to the cessation of Calnetics' bribery of VPI's employee and its insolvency, the Ninth Circuit erred in remanding for retrial, rather than dismissing, Calnetics' Section 7 damage claims. Again, the result is to reward, rather than penalize, commercial bribery.

V.

The interrelated rulings below adversely affect the development of the law in a very significant area.

Commercial bribery is a pervasive practice involving billions of dollars annually. Because it is hidden and camouflaged, as here, through the use of dummy corporations, post office boxes, and disguised as legitimate expenses, exact figures are unavailable. Domestic, as well as foreign purchasers are its target.[18]

The purpose of antitrust laws is to ensure competition on the merits; the objective of commercial bribery is the exact converse. Not only is the general public deprived of competition on the merits, but the hidden costs of the methods used to subvert competition are necessarily recovered from the public in the purchase price. That this gross interference with the operation of the marketplace is accomplished through devices that violate other laws, constitutes an aggravating circumstance, rather than an exculpation, as the court below apparently concludes.

Because the decision of the Ninth Circuit comes at a time when this country is acutely concerned with the prevalence of commercial bribery, and is exploring what legal weapons are available to combat such corruption of the marketplace, that decision is particularly unfortunate. Un-

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[18] One recent estimate was that commercial bribery constituted a $3-billion business. *White-Collar Justice: A BNA Special Report on White-Collar Crime,* ANTITRUST & TRADE REGULATION REPORT, No. 759, Part II, April 13, 1976; *Kickbacks as a Way of Life: How Widespread in U.S.,* U.S. NEWS & WORLD REPORT, Oct. 29, 1973, at 38-40; *Penney Reported Studying Payoffs To Its Executives,* New York Times, April 24, 1976, at 35, col. 3.

der that decision, not only private parties, but the Government itself, would be unable to stop conduct violative of the Sherman Act if grounded on commercial bribery.

The interrelated rulings of the court below respecting commercial bribery and its fruits represent not only clear error, but create a large gap in the protection the antitrust laws are designed to throw around the free functioning of the marketplace. Review by this Court of these important issues is clearly warranted.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that a writ of certiorari should issue to review the questions presented herein.

Respectfully submitted,

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September 14, 1976

APPENDICES

APPENDIX A

Findings of Fact and Conclusions of Law

Filed February 29, 1972

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

No. 70-2185-R

CALNETICS CORPORATION,
Plaintiff and
Counterclaim Defendant,

against

VOLKSWAGEN OF AMERICA, INC., *et al*,
Defendants,

R.W.C. SALES CORPORATION, *et al*,
Additional Defendants
on Counterclaims.

REAL, *District Judge* Feb. 29, 1972

FINDINGS OF FACT

1. Plaintiff and counterclaim defendant, Calnetics Corp. (hereinafter "plaintiff"), is a California corporation with

its principal place of business in the City of Industry, State of California. As plaintiff exists today, it is the product of several acquisitions and mergers beginning sometime around 1966. Plaintiff has engaged in business under several names, including Sudmeier Engineering Corp. and California Chassis Company. Prior to a recent corporate structural reorganization, plaintiff conducted business through unincorporated divisions: Meier-Line, Hydro-Flight, California Chassis and Room-Air. Plaintiff manufactured and continues to manufacture its automobile air-conditioners under the trade name "Meier-Line".

2. Defendant and counterclaimant Volkswagen Pacific, Inc. (hereinafter "VPI") is a California corporation with its principal place of business in Culver City, California. It is engaged in the business of distributing Volkswagen, Porsche and Audi automobiles in Southern California, Southern Nevada, Arizona and Hawaii pursuant to a franchise agreement with defendant and counterclaimant Volkswagen of America, Inc. (hereinafter "VOA"). In furtherance of its distribution rights, VPI franchises dealers to operate retail outlets within the VPI territory.

3. Defendant and counterclaimant VOA is a New Jersey corporation with its principal place of business in Englewood Cliffs, New Jersey. It imports into the United States Volkswagen, Porsche, and Audi automobiles. VOA distributes these automobiles by franchising distributors, such as VPI, in various areas of the country.

4. Defendant and counterclaimant Volkswagen Products Corp. (hereinafter "VPC") is a Texas corporation with its principal place of business in Ft. Worth, Texas. It is,

and under the name of Delanair Engineering Corp. has been, engaged in the manufacture of air-conditioners for automobiles.

5. VPI's primary business objective is to sell a maximum number of automobiles by providing the public with a competitive, economical and dependable product.

6. In an effort to attain this objective, VPI seeks to maintain the integrity and reputation of its product by providing its dealers and the consumer with an adequate supply of parts and accessories which are required for the safe, efficient and comfortable operation of the Volkswagen automobile and readily available facilities for the servicing of the automobile.

7. For that reason, VPI franchises dealers in areas throughout its territory.

8. Beginning sometime in the 1960's, the availability and installation of a competitively priced, efficient air-conditioning unit became an important competitive consideration in the sale and distribution of automobiles in the United States. In order to remain competitive with American-produced vehicles, and, to a lesser extent with other foreign vehicles, it was necessary for VPI to have available for sale and installation in its cars one or more competitively priced, efficient air-conditioning units.

9. In the fall of 1968, based upon representations made by plaintiff to Rolf Christiansen, VPI's service manager, to VPI as to the quality and effectiveness of the Meier-Line units, VPI made the decision to stock and sell Meier-Line air-conditioners and commenced to purchase Meier-Line air-

conditioners for resale to its dealers. At that time, it ceased all but minimal purchases of Delanair air-conditioners from VOA, its then air-conditioning supplier.

10. Based on plaintiff's representations to VPI, VPI informed its dealers that it would be able to supply them with Meier-Line Type III and Karmann Ghia units beginning December 1, 1968. The first Type III air-conditioners were not received from plaintiff until March, 1969. Plaintiff also failed to supply VPI dealers with needed air-conditioners through the spring, 1969.

11. Because of plaintiff's delay in delivering air-conditioners, various dealers purchased air-conditioners from DPD Manufacturing Co. (hereinafter "DPD"), another air-conditioner manufacturer.

12. By late spring, 1969, VPI began experiencing serious defects with Meier-Line air-conditioners.

13. By late summer VPI received numerous complaints from its dealers regarding serious defects with Meier-Line air-conditioners they had purchased.

As a result of their poor experience with Meier-Line air-conditioners, many dealers notified VPI that they would no longer purchase Meier-Line air-conditioners. Several dealers canceled all outstanding orders for Meier-Line units and a few even returned their entire stock of Meier-Line units.

14. During the first nine months of 1969, DPD sold just under 1,500 air-conditioners directly to VPI dealers.

15. Throughout 1969, DPD personnel continually contacted VPI in an attempt to sell DPD air-conditioners to VPI.

16. By late summer, 1969, DPD was selling its air-conditioners to more than 40 VPI dealers.

17. By reason of the problems with and dealer complaints received concerning the Meier-Line air-conditioners, the refusal of many VPI dealers to purchase those units, and the widespread success of DPD in the VPI area, in the fall of 1969 VPI determined, in its independent business judgment to cease handling Meier-Line air-conditioners on an exclusive basis and to distribute the full line of DPD air-conditioners. This decision reflected a policy decision by VPI that it was in its interests and those of the dealer and Volkswagen purchaser to have a choice of air-conditioners for each type of automobile.*

18. In October, 1969, VPI decided to purchase a limited number of VPC air-conditioners for installation into VPI field cars and for limited distribution to its dealers to determine whether the quality of the VPC units were acceptable to the Volkswagen dealer and customer.

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* By its "Order On Various Motions" dated May 31, 1972 the Court replaced Finding Number 17, stating:

> "1. Paragraph 17 of the Findings of Fact incorporated as part of the Court's Order granting Summary Judgment in favor of Volkswagen Pacific, Inc., against plaintiff on all antitrust claims is hereby amended to read: 'there is no credible evidence that VPI's ceasing to handle Meier-Line air-conditioners on an exclusive basis or at all was the result of any combination or conspiracy by VPI resulting from its voluntary act or acts.' In all other respects the findings heretofore entered regarding said summary judgment are hereby affirmed."

19. Beginning toward the end of 1969, VPI began receiving complaints from dealers regarding plaintiff's handling of their warranty claims.

20. Thereafter, VPI and plaintiff had continual and serious disagreement over Meier-Line's warranty and warranty procedures.

21. VPI continued to experience many defects with Meier-Line air-conditioners in 1970.

22. On January 22, 1970, representatives of VPI and plaintiff met to discuss the warranty problems and the poor relationship between the parties. Plaintiff indicated its desire to sell its Meier-Line air-conditioners directly to VPI dealers. VPI readily agreed. In view of the difficulties VPI experienced with the Meier-Line unit and the difficulties VPI experienced with plaintiff regarding warranty administration and payment, VPI had no desire to purchase additional Meier-Line air-conditioners from plaintiff.

23. From October, 1969 VPI has made available to its dealers at least two brands of air-conditioners for each type of automobile VPI sells.

24. VPI's dealers are now, and always have been, free to purchase any type air-conditioner they desire from any source they desire. At various times from at least as early as 1964 to the present when VPI did not supply the brand air-conditioner which dealers desired, the dealers purchased their air-conditioners from sources other than VPI.

25. Today, dealers continue to purchase air-conditioners from sources other than VPI, including from plaintiff, without threat or reprisal of any kind.

26. It is in VPI's business interest to have efficient and profitable dealers. Therefore, VPI assists its dealers in various phases of the dealers' operation to achieve those ends. One of the ways in which VPI renders such assistance is by having a field force experienced in particular areas important to the efficient operation of a dealership. The purpose of having VPI's field representatives visit dealers is to assist the dealers in organizing and developing the dealership to its fullest potential, thereby ensuring maximum profits for the dealer and a uniformly high-quality of service for Volkswagen customers and owners.

27. The purpose of dealer visit reports is to allow VPI to determine whether every possible step is being taken to assist the dealer in maximizing his profits and providing the Volkswagen customer and owner with the highest quality service and to ensure that the dealer is discharging his obligations under his franchise agreement.

28. The primary function of VPI's sales field representatives is to receive dealer orders for Volkswagen automobiles. Additionally, these representatives assist the dealers in the areas of promotion and advertising, in training dealer sales and management personnel, and alert the dealer to various ways in which it can strengthen its business management.

29. The function of VPI's field service representatives is to ensure the efficient and profitable operation of the dealers' service facilities. This includes ensuring that the

dealers have well-trained, fully-staffed service forces, in part by aiding the dealers in hiring well-trained personnel and by arranging for additional training of personnel at VPI's training center. The field service representatives also assist the dealer in resolving customer complaints and in handling technical service problems. Additionally, the representatives alert dealers to the latest service information contained in VPI's service bulletins and generally render such additional assistance as may be required.

30. The function of VPI's parts field representatives is to assist the dealer in developing its parts department to its fullest potential, thereby maximizing that department's profits. Generally, their function is to aid the dealer in maintaining an efficient, smoothly-operating parts department and in coordinating the parts department's inventory with the requirements of the service department in order to ensure that various departments in the dealership operate as integrated, coordinated units. The parts field representatives also assist the dealer in developing a well-trained, fully-staffed parts force, in developing and maintaining adequate inventory controls, thereby ensuring a well-stocked, balanced inventory of parts and accessories, and sell such parts and accessories as the dealers wish to purchase.

31. All these field functions are performed with a view to providing the Volkswagen customer with efficient and readily available facilities for the purchase of the automobile and parts and accessories for the automobile and for the servicing of those automobiles when required.

32. VPI has never threatened nor imposed on any dealer any sanction for purchasing air-conditioners or any other part or accessory from sources other than VPI.

Conclusions of Law

1. VPI did not combine or conspire to restrain unreasonably the trade and commerce in the distribution and sale in the VPI territory of air-conditioning systems for Volkswagen, Porsche, Karmann Ghia or Audi automobiles in violation of Section 1 of the Sherman Act, or any other antitrust law.

2. VPI did not combine or conspire to monopolize the trade and commerce in the manufacture, distribution or sale in the VPI territory of air-conditioning systems for Volkswagen, Porsche, Karmann Ghia and Audi automobiles in violation of Section 2 of the Sherman Act, or any other antitrust law.

3. VPI did not monopolize or attempt to monopolize the trade and commerce in the manufacture, distribution or sale in the VPI territory of air-conditioning systems for Volkswagen, Porsche, Karmann Ghia or Audi automobiles in violation of Section 2 of the Sherman Act.

4. The complaint does not allege a cause of action against VPI for violation of Section 3 of the Clayton Act.

Dated: February 28, 1972

Honorable Manuel Real,
Judge of the United States District Court

APPENDIX B

Findings of Fact and Conclusions of Law

Filed March 1, 1972

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

NO. 70-2185-R

CALNETICS CORPORATION

Plaintiff and
Counterclaim Defendant,

against

VOLKSWAGEN OF AMERICA, INC.,
VOLKSWAGEN PACIFIC, INC., AND
VOLKSWAGEN PRODUCTS, INC.,

Defendants,

R.W.C. SALES CORPORATION, ROLF W. CHRISTANSEN, WILLIAM R. SACHKO, PHILIP BALLINGAL, D. C. HARDING, D. N. EMANUEL, F. E. EDWARD and R. S. BELLER,

Additional Defendants
on Counterclaim.

REAL, *District Judge*

March 1, 1972

I

PROPOSED FINDINGS OF FACT

1. That the decision by defendant Volkswagen Pacific, Inc. to discontinue the promotion of the Delanair air-conditioning systems was not causally related in any way to the entering into a sales commission agreement between plaintiff and RWC Sales Corporation.

2. That defendant Volkswagen of America cannot prove that it made any profits or could have made any profits in the relevant time period on the distribution of the Delanair air-conditioning systems.

II

CONCLUSIONS OF LAW

1. That the Court has jurisdiction of this action.

2. That defendants Volkswagen of America and Volkswagen Products Corporation have failed to state a cause of action under Sections 1 and 2 of the Sherman Act (15 U.S.C. 1, 2) in their First Counterclaim.

3. That defendants Volkswagen of America and Volkswagen Products Corporation have failed to raise a genuine and material issue of fact regarding the issues of liability and impact and proximate cause under any of their counterclaims.

4. That defendant Volkswagen of America has failed to raise a genuine issue of fact regarding its claims of damages under Section 4 of the Clayton Act (15 U.S.C. 15) or under any of the antitrust laws or under any claim asserted in its counterclaims.

Dated this 29th day of February, 1972

HONORABLE MANUEL L. REAL
United States District Judge

APPENDIX C

Order on Various Motions
Filed May 31, 1972

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

No. 70-2185-R

CALNETICS CORPORATION,

Plaintiff,

against

VOLKSWAGEN PACIFIC, INC., *et al.*,

Defendants.

REAL, *District Judge*

May 31, 1972

Plaintiff and certain defendants having filed various motions, each of which has been fully briefed by the parties, and the Court being fully advised in the premises and after hearing on Monday, May 22, 1972, it is hereby ORDERED:

1. Paragraph 17 of the Findings of Fact incorporated as part of the Court's Order granting Summary Judgment in favor of Volkswagen Pacific, Inc., against plaintiff on all antitrust claims is hereby amended to read: "there is no credible evidence that VPI's ceasing to handle Meier-Line air-conditioners on an exclusive basis or at all was the result of any combination or conspiracy by VPI resulting from its voluntary act or acts." In all other respects the findings heretofore entered regarding said summary judgment are hereby affirmed.

2. The motions of defendants Volkswagen of America, Inc., and Volkswagen Products Corporation for Summary

Order on Various Motions

Judgment with respect to plaintiff's claims for relief under Section 1 and 2 of the Sherman Act are hereby DENIED.

3. Jury trial of the issues in this case under Sections 1 and 2 of the Sherman Act is hereby set to begin at 9:30 A.M., Tuesday, July 11, 1972.

Dated this 31st day of May, 1972.

s/ MANUAL L. REAL
United States District Judge

APPROVED AS TO FORM:

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APPENDIX D

Memorandum Opinion and Order

Filed June 30, 1972

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

No. 70-2185.

—o—

CALNETICS CORPORATION,

Plaintiff,

v.

VOLKSWAGEN OF AMERICA, INC., et al.,

Defendants.

—o—

REAL, *District Judge.*

June 30, 1972.

This matter comes on for decision after trial by jury of damages claimed by plaintiff against defendants as the result of alleged violations of Section 7 of the Clayton Act [15 U.S.C. § 18], and trial to the court sitting without a jury to compel a divestiture of the acquisition of Delanair Engineering Co. Inc. by Volkswagen of America, Inc., on September 26, 1969.

THE PARTIES

Plaintiff Calnetics Corporation (hereinafter referred to as Calnetics) is a California corporation operating a group of related divisions engaged in the businesses of manufacturing and selling air conditioners, components and parts thereof, sheet metal fabrication, tool and part machinery, and plastic moldings and extrusions. Plaintiff is the successor in interest to Sudmeier Engineering Corporation.

Plaintiff complains here of antitrust violations affecting its Meier Line division in the manufacture and sale of air conditioners, components and parts thereof, for use in Volkswagen automobiles.

Defendants are various entities engaged in the distribution of Volkswagen automobiles within the United States. Defendant Volkswagen of America, Inc. (hereinafter referred to as VWoA) is a New Jersey corporation. It is a wholly owned subsidiary of Volkswagen Werk A.G., a German corporation, the manufacturer of Volkswagen automobiles in Germany. VWoA imports Volkswagen, Porsche and Audi automobiles into the United States for sale through fourteen distributorships set up regionally throughout the United States. Five of these distributorships are wholly owned subsidiaries of VWoA. The remaining nine are independently owned and operated.

Volkswagen Pacific, Inc., a California corporation (hereinafter referred to as VPI), is an independently owned and operated distributor of Volkswagen, Porsche and Audi automobiles in Southern California, Southern Nevada, Arizona and Hawaii.

Volkswagen Products, Inc., a Texas corporation (hereinafter referred to as VPC), is the successor in interest to Delanair Engineering Co., Inc. (hereinafter referred to as Delanair). Delanair and its successor VPC have engaged in the manufacture and sale of air conditioners, components and parts thereof, for use in automobiles. Delanair was acquired by VWoA on September 26, 1969, as a wholly owned subsidiary, and has with its change of name to VPC remained so during all times material to this litigation. It is this acquisition which brings the parties before the court.

Other parties are brought before the court by way of counterclaim on behalf of VWoA but are not necessary to

the issues to be decided herein and are therefore omitted from identification as parties.

The Litigation

This litigation was commenced by the filing of a complaint by Calnetics on September 28, 1970 charging defendants VWoA, VPI and VPC with violations of Sections 1 and 2 of the Sherman Act [15 U.S.C. §§ 1, 2] and defendant VWoA with violation of Section 7 of the Clayton Act [15 U.S.C. § 18]. Plaintiff sought damages and injunctive relief resulting from the claimed violations of the antitrust laws of the United States.

During the pretrial proceedings of the action, the Court, pursuant to Rule 42(b) of the Federal Rules of Civil Procedure, severed the claimed violation of Section 7 of the Clayton Act [15 U.S.C. § 18] and the matter proceeded to trial against defendant VWoA upon those claims alone, reserving the remaining claimed violations of Sections 1 and 2 of the Sherman Act [15 U.S.C. §§ 1, 2] for later trial.

Defendants' alleged violation of Section 7 of the Clayton Act [15 U.S.C. § 18] is alleged to have damaged plaintiff by substantially lessening competition and tending to create a monopoly in the manufacture, distribution and sale of air conditioning systems for Volkswagen, Karmann Ghia and Porsche automobiles and the foreclosure of that market to plaintiff. The relationship created by the acquisition of Delanair by VWoA is claimed to destroy incentive to compete and deter new entry into the line of commerce foreclosed to plaintiff. The claim for damages proceeded to trial before the Court sitting with a jury and resulted in a judgment for directed verdict for defendant pursuant to Rule 50(a).

Proceeding without a jury the Court heard further evidence upon the equitable relief claims of plaintiff. After the completion of the evidence and summation of counsel, the Court submitted the matter for decision.

The Issues

1. Does plaintiff have a claim for treble damages and/or injunctive relief for claimed violations of Section 7 of the Clayton Act?

2. What constitutes the line of commerce or product market?

3. What is the geographic territory or section of the country involved?

4. Does the acquisition of Delanair by VWoA violate Section 7 of the Clayton Act?

5. Is the proffered "failing company" defense available to defendant VWoA?

The Facts

The Calnetics story commences, for the purposes of this litigation, with the increasing recognition during the 1960s of a need for an air conditioner compatible to Volkswagen automobiles with their low horsepower and rear-mounted air-cooled engines.

Calnetics in its Meier-Line division completed its development in 1967 in what it considered a unique air conditioner compatible to low horsepowered automobiles. This

development, so far as Calnetics was concerned, was limited to a compressor unit and clutch assembly designed to minimize the horsepower drawn from the automobile engine. All other parts of the air conditioner marketed by Calnetics were standard items available from manufacturers engaged in the business of marketing components and parts in the general air conditioner field. Calnetics was then an assembler of standard parts into an air conditioning unit adaptable to low horsepower automobiles of foreign and domestic manufacture. Calnetics, however, chose during 1967 and 1968 [1] to limit itself to manufacture (in the assembly aspect of manufacturing) of air conditioning units for the Type I automobile in the Volkswagen family.[2] This limitation resulted from two factors—1. the limited production facilities of Calnetics,[3] and 2. a recognition that Volkswagen automobile owners represented the best available market to exploit this new development in automobile air conditioning.

Competitively, Calnetics entered a market then (1967-68) being supplied by Delanair and DPD[4] with very negligible market intrusions in various Volkswagen and Porsche models by ARA, Parkomat, Novi, Behr and Coolaire. The Marketing potential[5] as recognized and exploited by

[1] In 1967 Calnetics sold 317 units and in 1968 sales amounted to 988 units.

[2] The Volkswagen family of automobiles include Type I—the commonly referred to "bug" or "beetle" and Karmann Ghia; Type II —the bus or van; Type III—the fastback or squareback; Porsche 911; and Porsche 912.

[3] Production capacity was limited to 2 units per day.

[4] 1967: Delanair sold 23,620 units accounting for 85.5% of the market. DPD sold 3,700 units accounting for 13.4% of the market.
1968: Delanair sold 37,127 units accounting for 82.3% of the market. DPD sold 7,000 units accounting for 15.5% of the market.

[5] At one time it was estimated that there were 1,250,000 Volkswagen Type I automobiles on the road without air conditioning.

Calnetics in these early stages of production was two-fold—1. independent distributors of automotive products,[6] and 2. Volkswagen dealers franchised by VPI to sell the Volkswagen family of automobiles within the VPI territory. In addition to these markets, Calnetics through its then president William Sachko was undertaking activities [7] which would in late 1968 result in the entire production of Calnetics being assigned to VPI directly for distribution to Volkswagen dealers in the VPI marketing area. Mr. Sachko's machinations brought Calnetics to the position as the exclusive supplier for VPI and lost to Calnetics the future potential of marketing its air conditioners with independent automotive accessory distributors. The sales efforts [8] of then Sales Manager (and later President) of the Meier-Line division of Calnetics, Mr. Charles Howseman, were completely nullified by Mr. Sachko. All of these negotiations with VPI were carried on by Mr. Sachko without consultation with Mr. Howseman.

[6] These independent automotive products distributors sold directly to a purchaser of a Volkswagen automobile or in some instances to Volkswagen dealers for dealer installation of the air conditioner in a Volkswagen automobile.

[7] These activities included the negotiation and execution of an agreement with Rolf W. Christiansen, parts service manager for VPI, to pay R.W.C. Sales Corporation (owned by Christiansen and Philip Ballingal, his assistant) a commission of 3% of the gross sales of air conditioners, components and parts thereof to VPI. Rolf W. Christiansen was described during the trial as "a dominating factor in the selection of Meier-Line air conditioners purchased by Volkswagen Pacific."

The sales so made cannot be excluded for purposes of determining a total market for Section 7 considerations, but because of the source are excludable in any consideration of the damage issue presented by Calnetics.

[8] Mr. Howseman had negotiated distribution agreements with several independent distributors of automobile accessories throughout California which in November 1968 were unilaterally cancelled by Calnetics.

In 1969 Calnetics, now armed with an exclusive VPI contract, moved to a new production facility and began full production in June of that year to meet the demands being made upon it by VPI. Increases were in fashion. Production increased, sales increased [9] and so did the problems, both financial and quality of product. Warranty claims and dealer complaints reached such a point that by the time production facilities had been developed to the capacity of the anticipated potential of increased sales, VPI was compelled to, and did begin to offer both DPD and Meier-Line air conditioners to its Volkswagen dealers. DPD's competitive intrusion into the VPI territory was not only aided by Calnetics' failures but also with the quality problems being simultaneously experienced by Delanair.

Delanair's story is equally interesting. Delanair started its existence sometime prior to 1963 as a division of Overseas Motors Corporation of Fort Worth, Texas, manufacturing air conditioning units as an add-on [10] primarily for Jaguar, Rolls-Royce and Volkswagen automobiles. Sometimes in 1963 a British Company, Delaney-Galley, became interested in and did acquire the air conditioner manufacturing division of Overseas Motors and incorporated Delanair Engineering Co., Inc. as a subsidiary of Delaney-Galley to succeed to the business of this division. Though the acquisition by Delaney-Galley was to obtain expertise in the air conditioning field, it soon found itself with an operating and profitable [11] business in the United States. Because of restrictions by the British government of the

[9] 1969 sales for Calnetics amounted to 4,134 units sold exclusively to VPI.

[10] An "add-on" unit is one not designed for installation as an integral part of the design configuration of an automobile.

[11] Delanair gross sales for 1967 were $4,213,000. In 1968 gross sales jumped to $7,248,000. During these years Delanair accounted for more than 40% of the total sales of Delaney-Galley.

export of money,[12] the financing of Delanair's operations was accomplished by United States bank loans guaranteed by Lindustries, Ltd., the British parent corporation of Delaney-Galley. That guarantee extended a line of credit to Delanair in the sum of $1,500,000.

Delanair in 1968 experienced sales of 37,127 air conditioning units for Volkswagen and Porsche automobiles. These sales were accomplished through VWoA, who had by that time become Delanair's only customer.[13] But like Calnetics, quality problems increased throughout the spring and summer of 1968. During 1968 VPI ceased to purchase Delanair air conditioners from VWoA and substituted DPD. Later Meier-Line was added and eventually became the primary line of VPI air conditioner offerings.

By June of 1969 the problems had reached such proportions that in the advent of the air-conditioning season[14] of 1969 sales had come to a virtual standstill. Recognizing the acute nature of the problems being experienced the president of Delaney-Galley was commuting monthly from England to Fort Worth, Texas during late 1968 and 1969. Buying management and technical knowhow in 1963, Delaney-Galley now found it necessary to relieve the president, production manager and quality control manager of their duties with Delanair in March 1969. VWoA was enlisted in a sales campaign to bolster the sagging finances of Delanair. On July 14, 1969 VWoA was approached—

[12] An English company was required to pay a 26% penalty for the export of money from England, i. e., every dollar sent from England actually cost the English company $1.26.

[13] In the year ending September 28, 1968 VWoA accounted for 97% of the sales of Delanair. VWoA in turn offered for sale these air conditioners to Volkswagen distributors, both independent and its own subsidiaries throughout the United States.

[14] The air-conditioning season is generally considered in the automobile industry to peak from May to October.

with negative results—in an effort to alleviate the problem by urging the purchase of Delanair by VWoA.

Faced with the reality of curtailed income which would require Delaney-Galley and/or Lindustries, its parent company, to provide cash or further credit[15] by American financial institutions to meet impending calls on $1,300,000 in obligations to the Fort Worth National Bank and operating capital to weather the crisis, Mr. Dennis Harwood-Jones, the president of Delaney-Galley recommended to his Board of Directors the sale of the Delanair subsidiary.[16] Reciting these enumerated reasons, Mr. Harwood-Jones, in total candor, further testified at the trial:

> "We had no desire to have a manufacturing operation of this size in the American market. We initially set out to acquire the knowledge for our own use in England and to enable us to manufacture a satisfactory unit to the American comfort standard for American automobile manufacturers to add to their vehicles on the production line.
>
> "We had no desire to indulge in an after market type of unit, and the fact that we had acquired this knowledge and were already achieving a capability, had been satisfied, and was a major point in determining to sell this company."

Given the responsibility of selling Delanair before the end of the then current trading year.[17] Mr. Harwood-Jones

[15] There was no question that Lindustries had the capability to provide the needed capital (estimated at $150,000) to continue the operations of Delanair. In 1969 Lindustries had total gross revenues of about $65,000,000 and Delaney-Galley about $15,000,000.

[16] Mr. Harwood-Jones reported to his Board of Directors anticipated losses of $800,000—$1,000,000 and a likelihood that Delanair would not be able to meet current commitments to creditors.

[17] September 27, 1969.

first approached DPD as the most likely company to be interested in the acquisition. On July 24, 1969 DPD Company evidenced by letter its intent to purchase Delanair, the purchase to be closed September 1, 1969. This agreement temporarily ended the search for a buyer.

During August 1969 DPD attempted, unsuccessfully, to conclude financial arrangements[18] which would permit the purchase to be accomplished on September 1, 1969. The date was extended to September 15, 1969, but giving Delaney-Galley the option to look for purchasers elsewhere. Mr. Harwood-Jones then approached John Stuart Perkins, President of VWoA, requesting financing of Delanair by VWoA. The response of VWoA was negative.

Still attempting to meet his deadline, Mr. Harwood-Jones approached Lone Star Engineering Company, Fort Worth, Texas, and Behr, a manufacturer of air conditioners in Stuttgart, Germany, each with negative results. The asking price in these negotiations was between $750,000 and $1,000,000 and assumption of Bank of Fort Worth liability of $1,300,000 based upon Mr. Harwood-Jones' appraisal of the potential of Delanair as an operating company. With the reluctance, but not the inability, of Delaney-Galley to aid its subsidiary financially during these times, the creditors were requested and unanimously cooperated to a delay in the payment of the current obligations due them from Delanair. Heatransfer, a new entry into the field of automobile air conditioning, was discounted as a potential buyer because of disapproval by Delaney-Galley of the Heatransfer method of cooling over the back of the automobile.

[18] Most important of these financial arrangements was $100,000 cash and discharge of the liability of Lindustries upon the $1,300,000 obligation at the Fort Worth National Bank.

While these latter negotiations were being pursued, Delaney-Galley continued its efforts to sell Delanair to VWoA. During his trip to Frankfort, Germany to contact Behr, Mr. Harwood-Jones again talked to Mr. Perkins and now elicited some personal interest from him. The discussions were continued in London, England and on September 24, 1969 the discussions were continued at the home offices of VWoA in Englewood Cliffs, New Jersey. With three days of negotiations the persuasion was irresistible and on September 26, 1969 the acquisition of Delanair by VWoA became a reality. Almost immediately Delanair become VPC and VWoA now had, within its own organization, the manufacturing capability to supply its channels of distribution of air conditioners for its automobiles.

With new management,[19] new financing,[20] new name,[21] and intensive sales effort,[22] VPC began the climb back in

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[19] A product of Volkswagen organizational training from 1950, Mr. Gerold Fray Schlager was transferred from Volkswagen Southeastern Distributor, Incorporated, a subsidiary of VWoA and installed as Vice President and General Manager of VPC.

[20] VWoA advanced interest-free to VPC the sum of $545,000.

[21] The name Delanair was changed to VPC. Delanair like Meier-Line were names that had reached the brink of anathema in the Volkswagen automobile air conditioning field.

[22] Demonstrative of the intensity of sales effort by VWoA are the discussion of Mr. John Stuart Perkins, President of VWoA and Guenter Kittel, Vice President—Parts Manager of VWoA, which prompted Mr. Kittle to memoralize as:

> ". . . Mr. Weill promised that he will join our marketing efforts . . . ."

The Mr. Weill referred to is Mr. Samuel Weill, Jr., President of VPI.

Concurrently with the acquisition—September 26, 1969—all Volkswagen distributors in the United States were informed with the announcement of a 1970 modified version of Type I and Type III air conditioners by Mr. John Stuart Perkins, President of VWoA.

Announcements were made that Volkswagen was in the air conditioning business.

More significantly, this market reversal was accomplished with little, if any, improvement in the air conditioner produced by Delanair in 1968 and 1969.

dominance of the competitive Volkswagen air conditioner market. From the low 1969 market position—24,149 and 52.4% of the Volkswagen air conditioner market—the dramatics of the acquisition was evidenced in 1971 when 68,211 units or 71.0% of the market were VPC sales. In less than two years VPC had not only completely eliminated Calnetics as a competitor in VPI's procurement of Volkswagen automobile air conditioners but had made significant impact on the competitive positions of DPD, Heatransfer and Coolaire.[23]

Recognizing the competitive realities of the loss of exclusivity of the VPI market and the limited funds available to it, Calnetics turned to a search for new—and the recapture of old—customers. Increasing the scope of its product line Calnetics with its limited resources—attempted to capture, in some degree, the air conditioner market for all compact automobiles of both foreign and domestic manufacture.[24] The summer of 1969 was too hot for Calnetics air conditioning endeavors and on Decembre 4, 1969 Calnetics met its creditors to review its operating status and attempt to stave off bankruptcy, voluntarily or involuntarily threatening it. These efforts have been successful and Calnetics remained sufficiently viable at the time of trial to continue its competitive efforts on a curtailed basis selling air conditioners for Volkswagen automobiles.

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[23] Between 1970 and 1971 (the first year of effective operation of the VPC manufacturing facility—market position reductions—DPD from 36.9% in 1970 to 26.0% in 1971—Meier-Line (Calnetics) from 3.5% to .4%—Heatransfer from 7.3% to 2.3%—Coolaire from .5% to .3%—were significant.

[24] Calnetics holds itself out as having the capacity to produce air conditioners for Volkswagen, Porsche 911 and 912, Toyota Corona, Toyota Corolla, Toyota Mark II, Vega, Opel and Pinto.

Memorandum Opinion and Order

With these facts as some background of the litigative stance of the parties, the Court now proceeds to determination of the issues presented.

1. Standing of Plaintiff.

Corporate mergers and acquisitions are proscribed in the anticompetitive sense by Section 7 of the Clayton Act [15 U.S.C. § 18] which provides in its pertinent part:

> "§ 18. Acquisition by one corporation of stock of another.
>
> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital . . . of another corporation, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

VWoA proposes as a threshold issue the standing of Calnetics to maintain a suit either for damages or injunctive relief (divestiture) for alleged violation of Section 7 of the Clayton Act [15 U.S.C. § 18].

Early in its consideration of antitrust legislation, the Congress provided a remedy to those private individuals damaged by reason of antitrust violations. The surviving treble damage remedy is found in Section 4 of the Clayton Act [15 U.S.C. § 15] which provides in its pertinent part:

> "§ 15. Suits by persons injured; amount of recovery.
>
> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained . . . ."

Memorandum Opinion and Order

Concurrently with this final enactment of the treble damage provision of the Clayton Act, which has survived since 1914, the Congress recognized that damages did not provide a totality of relief necessary to curb the lasting effects of continued anticompetitive conduct and enacted Section 16 of the Clayton Act [15 U.S.C. § 26] to provide for equitable relief in appropriate cases brought by private individuals. It provides in its pertinent part:

> "26. Injunctive relief for private parties; exception.
>
> Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage by violation of the antitrust laws, including section[s] . . . 18, . . . of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity . . . ."

The history of private litigation in antitrust matters has created a plethora of unquestioned authority in the area of Sherman Act violations. But in spite of the clear language of both Section 4 [15 U.S.C. § 15] and Section 16 [15 U.S.C. § 26] of the Clayton Act, defendants have, with some modicum of success, convinced courts that there exists no private right to maintain an action for damages suffered or equitable relief required from alleged violation of Section 7 of the Clayton Act [15 U.S.C. § 18]. VWoA here urges upon the Court the same position. Scrutiny of the decided cases, however, indicates that this contention is neither persuasive nor compelling.

In Continental Securities Co. v. Michigan Cent. R. Co., 16 F. 2d 378 at page 379 (6th Cir. 1926), cert. denied, 274 U.S. 741, 47 S.Ct. 587, 71 L.Ed. 1320, the court does say in clear and explicit language:

> "It is now settled that a private suitor cannot invoke the aid of a court of equity to enjoin a violation of the Sherman Anti-Trust Act . . . .
>
> "The plaintiff gets no help from the Clayton Act. . . ."

But, the later explanation by the court makes clear that the status of the plaintiff as a stockholder was its prime concern. In proscribing a derivative claim by a stockholder to preclude recovery for antitrust injury to his corporation, the court says:

> "The other reason is that the favor of section 16 extends only to injunctive relief to be given to 'any person * * * against threatened loss or damage.' This is not appropriate language to reach such a suit as this, in which a stockholder files a representative suit, and apprehends no 'threatened loss or damage' save that which comes through the damage to his corporation. . . ."

American Commercial Barge Lines Company et al. v. Eastern Gas and Fuel Associates et al., 204 F.Supp. 451 (S.D. Ohio 1962) merely as a conclusion of law without further authority says:

> "5. An action cannot properly be brought by a private litigant under Section 16 of the Clayton Act, 15 U.S.C.A. § 26 for divestiture of assets allegedly acquired in violation of the antitrust laws."

In view of the clear language of Section 26 that "any person . . . shall be entitled to sue for and have injunctive relief" the only rational reading of *American Commercial Barge Company, supra,* would lead to the conclusion that the court was concerned with primary jurisdiction of the Inter-

state Commerce Commission and applied the exception provided in Section 16 proscribing private suit in matters within the jurisdiction of the Interstate Commerce Commission.

Highland Supply Corp. v. Reynolds Metals Co., 327 F.2d 725 (8th Cir. 1964)[25] note 3[26] at page 728 evinces a concern of the court in the kind of injury that a private litigant must show rather than a lack of available relief. The decision of the case is made, not on the absence of a private right, but

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[25] See the prologue and epilogue in 221 F.Supp. 15 (E.D.Mo. 1963) and 238 F.Supp. 561 (E.D.Mo.1965) respectively.

[26] Note 3 says:

> "3. We think that any effort to convert Section 7 of the Clayton Act into a *per se* violation of the anti-trust laws so as to give rise to a private right of action under the Clayton Act has been squarely checked by what is said by Mr. Chief Justice Warren in Brown Shoe Co. v. United States, 370 U.S. 294, 82 S.Ct. 1502, 8 L.Ed.2d 510. As interpreted in that case, Section 7 of the Clayton Act does not condemn all mergers, but only those having demonstrable anti-competitive effects. The statute deals with clearcut menaces to competition, not with accomplished monopolies, presently creating damage to a competitor, which is a *sine qua non* of a private right of action under Section 5 of the Clayton Act.
>
> Section 7 of the Clayton Act was intended to supplement the Sherman Act and:
>
> 'primarily to arrest apprehended consequences of intercorporate relationships before those relationships could work their evil, which may be at or any time after the acquisition, depending upon the circumstances of the particular case.'
>
> United States v. [E. I.] duPont [De Nemours] & Co., 353 U.S. 586 at 597, 77 S.Ct. 872, 1 L.Ed. 2d 1057. See this same case, 366 U.S. 316, 325-329, 81 S.Ct. 1243, 6 L.Ed.2d 318. That no private right of action accrues from such a violation, see: Independent Iron Works, Inc. v. United States Steel Corp., 322 F.2d 656 (9 Cir. 1963); United States v. Continental Can Co., D.C., 217 F.Supp. 761, 767 [S.D.N.Y.] (1963); United States v. Ingersoll-Rand Co., *et al.*, 218 F.Supp. 530 (W.D.Penna.1963), aff'd. 320 F.2d 509 (3 Cir. 1963); Gottesman v. General Motors Corp., 221 F.Supp. 488 (S.D.N.Y. 1963)."

upon the fact that the trial court had erroneously applied the statute of limitations to a single act of "acquisition" or "price-cutting" rather than as a course of conduct.

Limiting its consideration, and relying upon the analysis of Judge Pence in Bailey's Bakery, Ltd. v. Continental Baking Company, 235 F.Supp. 705 (D. Hawaii 1964), the court in Isidor Weinstein Investment Co. v. Hearst Corporation, 303 F.Supp. 646 (N.D.Cal.1969) precluded a claim for money damages for alleged violation of Section 7 of the Clayton Act [15 U.S.C. § 18]. The language quoted from *Bailey, supra,* 303 F.Supp. at page 650, is significant:

> "... In Bailey's ... District Judge Martin Pence stated:
> Since Clayton § 7 is concerned with the future monopolistic and restraining tendencies of corporate acquisition, i. e., probable (and hence not certain) future restraints on commerce, any damages claimed for prospective restraint of trade would be purely speculative, and a plaintiff cannot recover money damages for anticipated but unimplemented acts of restraint which may invade its interests. *While Clayton § 7 permits private injunctive and divestiture actions* in merger situations which may result in the proscribed restraints or monopolies, nevertheless, no private action for treble damages accrues from a Clayton § 7 acquisition. ..." (Emphasis ours.)

Judge Pence was postulating the difficult and, to him, legally impossible task of proof of causal connection between an acquisition and claimed damage of a competitor. The recognition of available injunctive relief is clear. Interestingly enough, five years later, recognizing the error and reminded by the admonition of Mr. Justice Frankfurter,[27] Judge Pence recants in Kirihara v. Bendix Corporation, 306 F.Supp. 72 (D.Hawaii 1969) and concludes at page 88:

> ... [T]his court is *now* convinced that to hold that Congress never intended the deterrent effect of § 4 to have any application to acquisitions which might violate § 7 upon completion, would absolutely negate the contrary inference which must be drawn from the fact that Congress has left § 4 unchanged and uncircumscribed since 1914. This court now concludes that it threw too wide a loop when it said in 1964: 'No private action for treble damages accrues from a Clayton § 7 acquisition.' 235 F.Supp. at 717.[28]

Reading the clear language of Sections 4 [15 U.S.C § 15] and 16 [15 U.S.C. § 26] of the Clayton Act and reviewing the comprehensive analysis of *Kirihara, supra,* pp. 80-88 compels the conclusion that Calnetics is properly before the Court in its damage claims and its request for injunctive relief required by the acquisition of Delanair by VWoA in violation of Section 7 of the Clayton Act [15 U.S.C. § 18].

Standing has yet another aspect. Private claimants under the anti-trust laws must show that *they*—even though given the status of private attorneys—general suffered some injury to "business or property" as disting-

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[27] "Wisdom too often never comes, and so one ought not to reject it merely because it comes late."

Dissenting in Henslee v. Union Planters National Bank & Trust Company, 335 U.S. 595, 69 S.Ct. 290, 93 L.Ed. 259.

[28] See also Gottesman v. General Motors Corp., 414 F.2d 956 (2d Cir. 1969) reversing 221 F.Supp. 488 (S.D.N.Y.1968) and Isidor Weinstein Investment Co. v. Hearst Corporation, 310 F.Supp. 390 (N.D.Cal.1970) the sequel to 303 F.Supp. 646 (N.D.Cal.1966).

uished from public injury[29] resulting from anticompetitive practices. VWoA contends that Calnetics falls short of this requirement since Section 7 of the Clayton Act [15 U.S.C. § 18] concerns itself with anticipated and prospective antitrust consequences and, as such, damages are inappropriate. The argument is adequately answered in *Kirihara, supra*, and needs no amplification here. That, however, is not determinative of the standing of Calnetics for equitable relief. Injunction and/or divestiture are concerned with the future. Actual present damage need not be shown as the predicate for such relief. Zenith Radio Corporation v. Hazeltine Research, Inc., et al., 395 U.S. 100, 89 S.Ct. 1562, 23 L.Ed.2d 129 (1969).

The evidence of individual as opposed to public injury is abundant. Calnetics is a company engaged in the marketing of air conditioners for Volkswagen automobiles as is VPC, the acquired company. It is, in reality (though not the most effective) a competitor in the market place. The viability of Calnetics—as David or Goliath— is not determinative of its standing to prosecute this action. So long as it remains an active entity, ready, willing and able to sell its goods Calnetics has standing in fact to maintain this action.

2. The Product Market.

An essential inquiry in the determination of a violation of Section 7 of the Clayton Act [15 U.S.C. § 18] is the delineation of the line of commerce or product market. It is essential because "the product" defines the competitive environment to which the protection of Section 7 is

[29] The role of Don Quixote in protecting the honor of fair damsel "Public" is left to the Attorney General of the United States by statute and government's traditional role as parens patriae.

extended.[30] Reported cases have largely been limited to governmental concerns for the protection of competition where courts have narrowed and broadened the product market without real criteria or consistency. The dilemma is evident in the language of Mr. Justice Stewart in United States v. Von's Grocery Company, 384 U.S. 270, 86 S.Ct. 1478, 16 L.Ed.2d 555 (1966):

> "... The sole consistency that I can find is that in litigation under § 7, the Government always wins. ..."

The literature[31] discussing Section 7 of the Clayton Act [15 U.S.C. § 18] enumerates line of commerce considerations as threefold—1. reasonable interchangeability of use, 2. cross elasticity of demand,[32] and 3. peculiar characteristics and uses.[33] The distinctions are purely semantic. Analysis of competition must be predicated on the product involved. Perhaps a more realistic view would be to couch the test in terms of a single consideration of the product or its "equivalents".[34]

VWoA maintains that the test applicable here is the broad market of automobile air conditioners as defining the relevant product market. Analysis shows the fallacy

[30] United States v. Penn-Olin Chemical Co. et al., 378 U.S. 158, 84 S.Ct. 1710, 12 L.Ed.2d 775.

[31] Including court decisions.

[32] Both reasonable interchangeability of use and cross elasticity of demand were first articulated in United States of America v. E. I. DuPont DeNemours & Company, 351 U.S. 377, 76 S.Ct. 994, 100 L.Ed. 1264 (1955).

[33] United States of America v. E. I. DuPont DeNemours & Company et al., 353 U.S. 586 77 S.Ct. 872 1 L.Ed.2d 1057 (1957).

[34] There appears to be no good reason that the patent law should have a monopoly on "equivalents".

of the assumption. Although there is a kinship (in that they accomplish the same purpose—cool the automobile) between a Buick air conditioner and a Volkswagen air conditioner, the relationship is purely "shirttail" Even the relationship of Volkswagen air conditioners to those of domestic and foreign low-horsepowered automobiles [35] lends no aid to VWoA's position—they simply are not interchangeable, i. e., they are not equivalents. The evidence shows that an air conditioner designed to operate in a Volkswagen automobile,[36] with its air-cooled, rear-mounted engine, will simply not operate without modification or substitution of parts, in any other automobile now operating on the highways of the United States. Equivalents cannot be broad brushed to minimize or maximize a relevant product market. Limitations are necessary to make the considerations reasonably reflect what actually happens in the marketplace. Certainly no one can argue that the air conditioner marketed for Volkswagen automobiles by VPC, or any other supplier, would be purchased by anyone other than those who own one of the Volkswagen family of automobiles. Concern for the realities of the marketplace was expressed by the Supreme Court in defining the relevant product market in Times Picayune Publishing Company et al. v. United States of America, 345 U.S. 594, 73 S. Ct. 872, 97 L.Ed. 1277 (1953). In *Times Picayune, supra,* Mr. Justice Clark writing for the majority voices this concern in note 31 as:

> "31. For every product, substitutes exist. But a relevant market cannot meaningfully encompass that infinite range. The circle must be drawn narrowly to exclude any other product to which, within reasonable variations in price, only a limited number of buyers will turn; in technical terms, products whose 'cross-elasticities of demand' are small . . . ."

[35] Pinto, Vega, Duster, Toyota, Opel and the like.

[36] Including the "Volkswagen family" of automobiles—Porsche and Karmann Ghia.

VWoA further suggests that because Calnetics' manufacturing facilities are capable of producing other air conditioners with "little modification" the relevant market is somehow defined more broadly. VWoA would have this Court so read United States of America v. Columbia Steel Company, 334 U.S. 495, 68 S.Ct. 1107, 92 L.Ed. 1533 (1948). VWoA misreads the *Columbia Steel* case, *supra.* Though there is a passing reference to the interchangeability of manufacturing facilities it is not the holding or rationale of the case. The Supreme Court's consideration in *Columbia Steel, supra,* was the impact the withdrawal of Consolidated Steel Corporation (the acquired company) as a buyer on the open market would have on the producers of rolled steel products. In that context the Court makes reference to the capacity of a rolled steel producer to employ the same facilities to "make other products interchangeably with shapes and plates," together with the rolled steel products being offered in the marketplace. Nowhere in the opinion does the Court lay down, or suggest, a rule that interchangeability of *production facilities* affects the consideration of a relevant product market. No other authority has been cited and none has been found by this Court that suggests that relevant product market should be measured by the capacity of the producer rather than the *product he sells* in the marketplace. Competition, by its very definition, must be measured by the marketplace of the same or equivalent products. To hold otherwise would mean that a producer who decides to sell automobile

air conditioners but is capable, with little or no plant changes, of producing refrigerator compressors is measured in the competitive marketplace by inclusion of refrigerators as part of the relevant product market. The statement of the hypothesis discloses its absurdity. Relevant market can be measured only to the product sold. Whether applied broadly or as a permissible submarket[37] the relevant market in this case can be measured only by air conditioners sold for use in the Volkswagen family of automobiles by VPC, DPD, Calnetics, Heatransfer and Coolaire.

3. The Geographic Market.

The second and somewhat overlapping consideration in measuring the effects of an acquisition is the geographic area of competition. In Brown Shoe Co. v. United States, 370 U.S. 294, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962), the Supreme Court sets forth the critical inquiry as:

> ". . . The geographic market selected must, therefore, both 'correspond to the commercial realities' of the industry and be economically significant." (At page 336, 82 S.Ct. at page 1530)

Commercial reality in our consideration of the Volgswagen automobile air conditioner market shows that the acquired company, VPC, competes in varying degrees with DPD, Calnetics, Heatransfer and Coolaire throughout the United States. More importantly, the consideration of a broad national market or a narrow regional market would compel the same result in the factual context of this case.

4. Violation of § 7 of the Clayton Act [15 U.S.C. § 18].

[37] Brown Shoe Co. v. United States, 370 U.S. 294, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962).

The genesis of Section 7 of the Clayton Act [15 U.S.C. § 18] in its present form can be summarized as the recognition by Congress that Sections 1 and 2 of the Sherman Act[38] and the original enactment of Section 7 in 1914 were inadequate to maintain a free and strong competitive market in the United States. Mergers and acquisitions were being saved more by form than substance and began threatening to negate the concern of Congress expressed in its earlier enactment of antitrust legislation. With the enactment of the Cellar-Kefauver Antimerger Act,[39] Congress laid to rest the generally held view that the exclusive attack upon vertical mergers had to be upon the difficult and near impossible finding of violations of Sections 1 and 2 of the Sherman Act.[40]

The first consideration of a vertical acquisition of the stock of one company by another in response to new legislation was in United States v. E. I. DuPont DeNemours & Co., 353 U.S. 586, 77 S.Ct. 872, 1 L.Ed.2d 1057 (1957). Applying Section 7 of the Clayton Act [15 U.S.C. § 18] in its present form to the 1917-19 acquisition by the DuPont Company of 23 percent of the stock of General Motors the Supreme Court says:

> "We hold that any acquisition by one corporation of all or any part of the stock of another corpora-

[38] 15 U.S.C. § 1 and 15 U.S.C. § 2 respectively.

[39] Antimerger Act of December 2, 1950. 64 Stat. 1125.

[40] United States v. Yellow Cab Co., 332 U.S. 218, 67 S.Ct. 1560, 91 L.Ed. 2010 (1947); United States v. Columbia Steel Co., 334 U.S. 495, 68 S.Ct. 1107, 92 L.Ed. 1533 (1947); United States of America v. Paramount Pictures, Inc., et al., 334 U.S. 131, 68 S.Ct. 915, 92 L.Ed. 1260 (1948).

See also F.T.C., Report on Corporate Mergers and Acquisitions, H.R. Doc. No. 169. 84th Cong. 1st Sess. (1955); H.R. Rep. No. 1191, 81st Cong., 1st Sess. 11 (1949).

> tion, competitor or not, is within the reach of the section whenever the reasonable likelihood appears that the acquisition will result in a restraint of commerce or in the creation of a monopoly of any line of commerce. . . ."

VWoA argues that its acquisition of its captive supplier Delanair cannot affect the competitive position of Calnetics vis-a-vis VWoA and there is therefore no violation of Section 7 of the Clayton Act [15 U.S.C. § 18]. VWoA misses the point. Section 7 does not proscribe acquisitions which may damage or otherwise injure a particular participant in the market but rather condemns mergers or acquisitions which have the reasonable probability of restraining competition. Calnetics' position in the marketplace as an actual competitor to VPC, or as a potential competitor in markets now claimed foreclosed, justifies the complaint as we have determined earlier. The inquiry here is twofold—damages and/or injunctive relief.

The antitrust laws were not enacted nor have they ever been implemented by the courts to secure to any producer of goods a private preserve for its own exploitation. The purpose of the antitrust laws is the preservation of competition and so the producer who legitimately encroaches upon the private market preserve of another can do so with impunity so long as its actions neither restrain competition nor tend toward monopoly. This is the command of Sections 1 and 2 of the Sherman Act and the provisions of the Robinson-Patman Act proscribing price discrimination. Section 7 of the Clayton Act presents a perplexing dichotomy in its application to litigation brought by private parties. Determination of damage and equitable

relief claims must necessarily include vastly different considerations.

The position of an individual plaintiff in a Section 4 treble damage suit is individual, and impact must be viewed in the crucible of competitive effect on plaintiff's own private transaction in the market. Damages recoverable by a private antitrust claimant deal with actual, present and reasonably forseeable effects of an anticompetitive merger on the business or property owned by plaintiff. Calnetics has fallen short in its necessary proof of causal connection to its claimed loss of the VPI market and consequently a motion to dismiss has previously been granted by the Court.

Equitable relief presents different considerations. A case for divestiture is one in which a single competitor is but one element in the mosaic of competition. Divestiture affects all of the competitors in the marketplace and so all must be considered in the determination of violation vel non. Section 7 of the Clayton Act [15 U.S.C. § 18] was not enacted to equate "competition" with "survival" of a single entity but rather to provide the opportunity to freely enter and engage in the marketplace. In this respect there is no "target" at which to aim the anticompetitive acquisition. Competitors are victims of the fallout of the destruction of competition. A viable plaintiff competing in, or ready to enter into the marketplace gives the Court the cause for inquiry. The inquiry is the marketplace and the effects of the claimed anticompetitive acquisition upon the marketplace. For that reason a Section 7 divestiture plaintiff acts somewhat as a Rule 23 class representative and need not satisfy the requirement of "impact" in its

classical antitrust definition. In a nation that now exceeds one trillion, forty six billion dollars in gross national product, government cannot possibly be relied upon to provide vindication of every person or entity aggrieved by a violation of the antitrust laws. It must be left to private litigants to guarantee to themselves the assurance that the fuure will not repeat the past. Section 7 of the Clayton Act deals only with the future measured by reasonable probabilities of acquisition. It is that measure the Court applies here.

In the consideration of the probable effects of the acquisition of Delanair by VWoA, Delanair sales are markedly significant. As an independent subsidiary of Delaney-Galley, Delanair had captured 85.5% of the Volkswagen air conditioner business by 1967. In 1968 DPD and Calnetics reduced Delanair's position to an 82.3% market share. With the problems of 1968 still lingering and intensifying in 1969, Delanair dropped to 52.4%. Significantly DPD and Calnetics increased their respective positions to 32.5% and 8.9% and new entries Heatransfer and Coolaire contributed 5.4% and .6% respectively to the slide of Delanair. VWoA acquired Delanair September 26, 1969 and now as VPC the hold slipped to 51.8% in 1970. Viewed as a cold statistic it appears that the merger had no real effect on the Volkswagen air conditioner business. Not lost in the evidence, however, is the pessimistic picture drawn by Mr. Harwood-Jones that counsel for VWoA in another context would have the Court view as the certain demise of Delanair as a competitor in the marketplace. With little change in the unit being offered—but with the new name—new management—and new financing furnished by VWoA, VPC in 1971 took a giant step to 71.0% of the market. In

the same period DPD dropped to 26.0% with the capacity and product that was considered by both VWoA and Delaney-Galley as the most competitive product on the market. Heatransfer with 2.3%, Calnetics with .4% and Coolaire with .3% had become for all practical purposes, nonexistent in Volkswagen automobile air conditioner production.

A dispassionate review of these facts leads to the inevitable conclusion that this acquisition is monopoly in its incipiency. As such, the acquisition is in violation of Section 7 of the Clayton Act [15 U.S.C. § 18].

To protect its acquisition from divestiture VWoA argues that its interest and investment in acquiring Delanair had considerations totally removed from scrutiny of the antitrust laws. It protests that faced with the events of late 1968 and the air-condition season of 1969, it was compelled to acquire Delanair—1. to guarantee a continued source of air conditioners and 2. to protect the Volkswagen reputation by offering an air conditioner qualitatively in keeping with Volkswagen excellence. Although this motivation finds some support in the evidence, high motivation and good faith does not rescue an otherwise anticompetitive acquisition from the attack of the antitrust laws. The concern of the courts in considering "beneficial" mergers or acquisitions is expressed in Ford Motor Co. v. United States, 405 U.S. 562, 92 S.Ct. 1142, 31 L.Ed.2d 492 (1972) when the Supreme Court says:

> "It is argued, however, that the acquisition had some beneficial effect in making Autolite a more vigorous and effective competitor against Champion and General Motors than Autolite had been as an independent. But what we said in United States v. Philadelphia National Bank, supra [374 U.S. 321,

83 S.Ct. 1715, 10 L.Ed.2d 915], disposes of that argument. A merger is not saved from illegality under § 7, we said, 'because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial. A value choice of such magnitude is beyond the ordinary limits of judicial competence, and in any event has been made for us already, by Congress when it enacted the amended § 7. Congress determined to preserve our traditionally competitive economy. It therefore proscribed anticompetitive mergers, the benign and the malignant alike, fully aware, we must assume, that some price might have to be paid.' 374 U.S. at 371, 83 S.Ct. [1715], at 1745, 1746 [10 L.Ed.2d at 949]."

Before leaving the subject, a word about the claim VWoA that it (as a buyer) was never a customer of Calnetics, that it dealt exclusively with Delanair and therefore there is no change in the competitive market in Volkswagen air conditioners.

The distributive pattern of the Volkswagen family of automobiles is important to this consideration. VWoA, as a wholly owned subsidiary of Volkswagen Werk A.G., manufacturer of Volkswagen automobiles in Germany, imports and distributes Volkswagen automobiles in the United States. Distribution is accomplished through fourteen regional distributors throughout the United States.

Although contemplated in the past and left to possibility in the future, Volkswagen automobiles do not have so-called OE[41] or factory installation of air conditioners. With the lack of factory installation, air conditioners can be installed

[41] O.E. is original equipment installed at the factory during assembly of the automobile.

—1. by VWoA, either on order of some distributor or upon its own plant installation ready for delivery to distributors, 2. by one of the fourteen regional distributors—again—on order of a dealer or upon its own plant installation ready for delivery to a dealer, 3. by the dealer on order of his customer, or 4. by some independent installer dealing in automotive products on purchase by an owner of a Volkswagen automobile, either in its new or used condition.

It takes little imagination and little or no expertise to recognize that, preferentially, air conditioners will be installed in Volkswagen automobiles in the descending levels of distribution. VWoA cites numbers in the millions of Volkswagens driving the highways of the United States as a potential market for Calnetics and the other producers to put their efforts. Assuming this potential far outstrips the total sales of 96,000 Volkswagen air conditioners in 1971, the plain fact is that this potential has already passed the marketing efforts of the three preceding levels of distribution without success. More importantly, these levels can offer their wares under the tacit, if not express, imprimatur of the Volkswagen name. The vice of the distributive pattern as it must inevitably be affected by VWoA's acquisition of Delanair is the "clog on competition" condemned by Section 7 of the Clayton Act [15 U.S.C. § 18].

4. The Failing Company Defense.

VWoA would have the Court save its acquisition of Delanair by application of the failing company doctrine. In International Shoe Company v. Federal Trade Commissions, 280 U.S. 291, 50 S.Ct. 89, 74 L.Ed. 431, the Supreme Court first articulated a circumstance in which the elimination of competition by merger or acquisition could survive scrutiny under Section 7 of the Clayton Act. Analyzing

the facts surrounding the financial difficulties of the acquired company, the court says at page 302, 50 S.Ct. at page 93:

> "In the light of the case thus disclosed of a corporation with resources so depleted and the prospect of rehabilitation so remote that it faced the grave probability of a business failure with resulting loss to its stockholders and injury to the communities where its plants were operated, we hold that the purchase of its capital stock by a competitor (there being no other prospective purchaser), not with a purpose to lessen competition, but to facilitate the accumulated business of the purchaser and with the effect of mitigating seriously injurious consequences otherwise probable, is not in contemplation of law prejudicial to the public and does not substantially lessen competition or restrain commerce within the intent of the Clayton Act. . . ."

See also Citizen Publishing Company v. United States, 394 U.S. 131, 89 S.Ct. 927, 22 L.Ed.2d 148 (1969) emphasizing the narrow escape of the failing company doctrine.

VWoA falls short of its burden on both tests—1. the grave probability of business failure and 2. the unavailability of prospective purchasers. Financial statements of Delanair for the period ending August 30, 1969, just twenty-six days before the acquisition, show a net loss of $262,387. Carrying forward retained earnings from 1968 in the sum of $526,665. Delanair was still in a retained earnings surplus position of $312,278 at the time of its acquisition by VWoA. Certainly Delanair was having its problems but accommodations had been made with its creditors and it had in the wings a capable, though unwilling, parent whose prime concern was to sell Delanair because "we had

acquired this knowledge and we were already achieving a capability". Delanair had served the acquired purpose for Delaney-Galley. Having served its purpose and now occasioning some financial concern the decision to sell solved the problem.

VWoA fails to meet the second requirement also. Delaney-Galley had in mind a well-defined route to follow in the offering of Delanair for sale. The route was defined by Mr. Harwood-Jones and his Board of Directors to obtain the best possible price for its American subsidiary. No effort was made to put the sale in the hands of a broker. Leads offered to Mr. Harwood-Jones were ignored because they were not the kind of people he thought could make the kind of arrangements he wanted. The press on VWoA to purchase Delanair was one considered in the best interest of Delaney-Galley and single-mindedly Mr. Harwood-Jones obtained his objective in September, 1969. Never could VWoA be considered as the "only available purchaser" but rather as the best available purchaser. "Failing company" simply has no factual support in the evidence.

Armed with the confidence that relief in an antitrust case must be effective to redress the violation and to restore competition[42] the Court now calls upon the parties to present plans for accomplishing the relief granted. Said plans to be submitted to the Court within thirty (30) days of the filing of this memorandum and order.

Judgment is for the plaintiff upon the equitable relief prayed. Details of the divestiture to abide the further entry of a supplemental judgment adopting an appropriate plan.

This memorandum opinion and order shall be deemed Findings of Fact and Conclusions of Law as permitted by Federal Rules of Civil Procedure, Rule 52(a).

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[42] Ford Motor Co. v. United States, *supra*.

APPENDIX E

Findings of Fact and Conclusions of Law as to Sections 1 and 2, Sherman Act Claims

Filed August 1, 1972

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

No. 70-2185-R.

CALNETICS CORPORATION,

Plaintiff,

v.

VOLKSWAGEN OF AMERICA, INC., *et al.*,

Defendants.

REAL, *District Judge.*

Aug. 1, 1972.

FINDINGS OF FACT

1. Calnetics Corporation ("Calnetics" or "Meierline") is a California corporation engaged in the business, among other things, of manufacturing and selling air conditioners, components and parts thereof, under the brand name "Meierline" for use in automobiles.

2. Defendant Volkswagen of America, Inc. ("VWoA") is a New Jersey corporation. It is a wholly owned subsidiary of Volkswagenwerk A. G., a German manufacturer of

Findings of Fact and Conclusions of Law as to Sections 1 and 2, Sherman Act Claims

automobiles. VWoA imports new vehicles into the United States for sale through fourteen wholesale distributorships set up regionally throughout the United States. Five of these distributorships are wholly owned subsidiaries of VWoA. The remaining nine are independently owned and operated.

3. Volkswagen Pacific, Inc. ("VPI"), a California corporation, is one of the nine independently owned and operated wholesale distributors buying new vehicles from VWoA. It sells to new car dealers franchised by it in Southern California, Southern Nevada, Arizona and Hawaii.

4. Volkswagen Products, Inc. ("VPC"), a Texas corporation, was formerly known as Delanair Engineering Co., Inc. ("Delanair"). VPC is engaged in the manufacture and sale of air conditioners, components and parts thereof, for use in automobiles. All the stock in VPC was acquired by VWoA on September 26, 1969, and VPC has remained a wholly owned subsidiary during all times material to this litigation.

5. Today VWoA imports into the United States three different makes of automobiles identified by the names "Volkswagen", "Porsche" and "Audi".

6. In addition to importing and selling new automobiles, VWoA also buys and resells a wide variety of parts and accesories. VWoA does not sell automobiles, parts or accessories directly to any dealer but sells only to its franchised wholesale distributors.

Findings of Fact and Conclusions of Law as to Sections 1 and 2, Sherman Act Claims

7. Three main fields of responsibility are recognized by VWoA and VPI in the operation of their respective businesses, namely, sales, service and parts. "Sales" concerns itself with the sale of new vehicles; "service" is charged with warranty, maintenance and repairs; "parts" is concerned with purchasing and reselling parts and accessories.

8. Although an accessory, like an automobile air conditioner, would normally fall within the jurisdiction of VPI's parts division, air conditioners were early recognized to be in a special category. Because an air conditioner, unlike many other accessories, may directly affect the performance and the operation of the vehicle itself, VPI's service department had a dispositive role in deciding what air conditioners VPI would buy and resell to its franchised new car dealers.

9. Prior to November 1, 1969, Rolf W. Christiansen ("Christiansen"), or "Whitey" Christiansen, as the head of VPI's Service Department and had occupied that position for several years.

10. Christiansen's immediate subordinate was Philip Ballingal ("Ballingal"), who occupied the position of Assistant Service Manager. Another subordinate was Vince Garno.

11. Prior to October, 1968, when the 1969 model year began, VPI bought all its requirements for air conditioners for Volkswagen vehicles from VPC (then known as Delanair), and from DPD, another air conditioning manufacturers.

Findings of Fact and Conclusions of Law as to Sections 1 and 2, Sherman Act Claims

12. On July 16, 1968, VPI's Parts Manager, Frank Duffy, wrote VWoA's Vice President for Parts, Mr. Kittel, the following letter reading in part:

"Dear Mr. Kittel:

"It is a well known fact that we have had problems with Delanair Air Conditioners ever since VWoA went into the Air Conditioner program.

"The largest competitor to Delanair has been DPD and while they (DPD) have a reputation of having a unit that is easier to install than Delanair (some dealers oppose this), we still received complaints from dealers who bought Type 3 DPD's from us, when we handled them for a limited time.

"Essentially, what the VW organization is looking for is an Air Conditioner company which has the capacity to manufacture *sufficient units for our needs.* A company with sufficient capital investment to *cover costs of production* of units and a good *parts inventory.* A company with *qualified technicians* and *administrators* with the proper training and background experience in the air conditioning field and one which is *flexible* enough to take care of model changes, modifications and improvements when such are found necessary.

"All of these things cannot be done by a neophyte company. It is only possible with a well-established, well-financed ORGANIZATION with qualified people.

"How many companies in the whole of the United States is capable of complying with these standards? You have, no doubt, looked into alternatives and know more about this than I do, but from where I

Findings of Fact and Conclusions of Law as to Sections 1 and 2, Sherman Act Claims

sit, it seems to me that our best bet is to stay with Delanair (assuming there is no clear-cut alternative) because they do have the personnel, the buildings, the machinery and, presumably, the 'know-how' but to ensure, for the future, better communications, more technicians in the territories to overcome field problems, more training of distributor personnel and more supervision by VWoA personnel to see that the above are carried out."

13. At the time this letter was written, plaintiff was a neophyte company in the air conditioning business, not yet engaged in mass production.

14. In July, 1968, and for some time earlier, Calnetics, through its then president William Sachko, was undertaking activities which would in late 1968 result in the entire production of Calnetics being assigned to VPI directly for distribution to Volkswagen dealers in the VPI marketing area. Mr. Sachko's machinations brought Calnetics to the position as the exclusive supplier for VPI and lost to Calnetics the future potential of marketing its air conditioners with independent automotive accessory distributors.

15. Because of Christiansen's position as head of the VPI Service Department, VPI sought and followed his recommendations regarding automobile air conditioners. In reliance on his recommendation and his advice, the VPI management decided in October, 1968, to cease buying and reselling the VWoA air conditioner and decided to buy and resell the Calnetics air conditioner.

Findings of Fact and Conclusions of Law as to Sections 1 and 2, Sherman Act Claims

16. Unknown to VPI and even to Calnetics' sales manager in charge of air conditioners, Christiansen had arranged with Calnetics to profit personally from turning VPI's business over to Calnetics.

17. Under date of October 14, 1968, plaintiff memorialized in a letter agreement an earlier oral agreement to pay Christiansen three (3%) percent of the gross proceeds from any sales of air conditioners to VPI. The verbal contract memorialized in the letter was made on October 9, 1968.

18. The letter was not sent to Christiansen at his office in VPI, but was addressed to "RWC Sales Corp." and was mailed to a post office box number belonging to Christiansen.

19. No corporation with the name "RWC Sales Corp." was in existence on October 14, 1968. Such a corporation was not formed until October 28, 1968. According to papers filed with the California Division of Corporations, seventy-five (75%) percent of the shares were issued to and owned by Christiansen and his wife and twenty-five (25%) percent were issued to and owned by Ballingal and his wife.

20. RCW Sales Corp. has been suspended by the Secretary of the State of California for failure to file or pay income tax returns for 1969 or any subsequent year. Its sole purpose was to serve as a cover for plaintiff's payments to Christiansen.

21. The October 14, 1968 letter agreement between Christiansen and plaintiff was subsequently renegotiated

on November 4, 1968 and again on January 31, 1969 to clarify and enlarge Christiansen's financial interest in plaintiff's sales of air conditioners for Volkswagen and Porsche vehicles. These subsequent agreements made no change in plaintiff's commitment to pay Christiansen three (3%) percent of the proceeds from the sale of new air conditioning units to VPI.

22. On October 9, 1969, the date of plaintiff's oral agreement to pay Christiansen three (3%) percent on all sales to VPI, Christiansen told VWoA's representatives that Delanair would no longer be distributed by VPI.

23. On October 11, 1968, VPI's parts manager, at the direction of Christiansen, issued a purchase order to plaintiff for nine hundred sixty (960) air conditioning units for Volkswagen vehicles.

24. On October 15, 1968, the date following the written memorialization of the agreement between plaintiff and Christiansen, a bulletin was issued over the signature of Christiansen to all dealers franchised by VPI and to their service managers advising them that effective November 1, 1968 VPI would distribute the Meier-Line air conditioners. The bulletin stated that the decision was "based on the excellent performance of these units in the field."

25. On November 6, 1968, a letter was sent each Volkswagen distributor by Christiansen denigrating VWoA's Delanair unit and urging the purchase of plaintiff's unit from VPI. The letter represented that VPI's decision to buy plaintiff's unit was predicated on an objective evaluation of all competitive air conditioning units.

26. On January 17, 1969, a bulletin was issued to all VPI dealers over the signature of Christiansen advising them that VPI would distribute plaintiff's units exclusively for Volkswagen vehicles and would also be distributing plaintiff's units for Porsche vehicles.

27. The contract between Christiansen and Calnetics was entered into surreptitiously and secretly. The use of a post office box and the creation of RWC Sales Corp. had as their purpose to conceal the underlying arrangements from knowledge of third persons, including VPI and VWoA.

28. Pursuant to plaintiff's agreement with Christiansen, the following payments were made to the latter, through RCW Sales Corporation, based on sales to VPI:

December 10, 1968	$ 324.00
January 10, 1969	1,350.00
February 7, 1969	880.03
March 17, 1969	443.72
April 10, 1969	444.24
April 21, 1969	2,397.59
June 10, 1969	2,996.88
July 21, 1969	1,662.22
August 11, 1969	4,375.69
September 17, 1969	776.25

29. Some small portion of these payments were given by Christiansen to Ballingal.

30. During the 1969 model year, VPI bought from plaintiff 3,697 air conditioning units and during the calendar year 1969 4,134 units. In consequence of these

purchases, plaintiff obtained in the calendar year 1969 approximately 8.4% of the total air conditioning sales of Volkswagen and Porsche air conditioners in the United States.

31. As a direct and proximate consequence of the agreement between Christiansen and plaintiff and the payments made to Christiansen in accordance with its terms, competitive suppliers of air conditioners for Volkswagen automobiles, including VWoA were excluded during the 1969 model year from selling air conditioners to VPI.

32. By October, 1969, when the 1970 model year began, VPI had decided to divide its business between Meier-Line and DPD. Christiansen wrote Duffy a memorandum on October 15, 1969 advising him that 3,500 units would be ordered from each supplier during the 1970 model year.

33. Plaintiff is claiming damages predicated on the market position it enjoyed during the 1969 model year, which began in October, 1968 and ended the following September and during which, in consequence of Christiansen's activities, VPI bought air conditioners exclusively from plaintiff. Plaintiff's theory is that it is entitled to compensation for the fact that its market position and sales have not remained at the level they reached during that model year.

34. Plaintiff is claiming damages on the theory that it is entitled to compensation from defendants for any diminution in its market share below the percentage share it enjoyed during the 1969 model year. Plaintiff has stipulated in open court that its sole theory of damages is

predicated upon a projection based upon its sales to VPI during the 1969 model year, all of which sales occurred during the operating period of the Christiansen-Calnetics agreement.

Conclusions of Law

1. Damages cannot be predicated upon sales on a market position obtained and enjoyed by reason of such conduct. Because of the source of plaintiff's sales during the 1968-1969 season, they cannot support a claim for damages.

2. The agreement described above between Calnetics Corporation, plaintiff herein, and RCW Sales Corporation creates a conflict of interest between Mr. Christiansen and his then-employer, Volkswagen Pacific, Inc. and all sales made by plaintiff's corporation during 1969 to Volkswagen Pacific, Inc. are thus. inadmissible for purposes of proving the damages allegedly sustained by plaintiff thereafter.

Based upon the findings of fact and conclusions of law enumerated above;

It is hereby ordered, adjudged and decreed as follows:

1. The previous denial of the motions for summary judgment by defendants VWoA and VPC, filed on February 18, 1972 and May 15, 1972, are hereby vacated as to plaintiff's claims under Sections 1 and 2 of the Sherman Act [15 U.S.C. § 1, 2].

2. Each of said motions are hereby granted.

3. The trial date of July 11, 1972 is hereby vacated.

APPENDIX F

Supplemental Memorandum Opinion and Order

Filed January 19, 1973

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

No. 70-2185-R.

CALNETICS CORPORATION,

Plaintiff,

v.

VOLKSWAGEN OF AMERICA, INC., *et al.*,

Defendants.

REAL, *District Judge.*

Jan. 19, 1973.

The acquisition by Volkswagen of America, Inc. (hereinafter referred to as VWoA) of the air conditioning business of Delanair [1] on September 26, 1969 was found by the Court to be in violation of the antitrust laws of the United States, Sections 4, 7 and 16 of the Clayton Act [15 U.S.C. §§ 15. 18, 26]. That decision filed June 30, 1972, Calnetics v. Volkswagen of America, Inc., D.C., 348 F.Supp. 606, left for consideration the scope of the equitable relief to be

[1] Delanair Engineering Co., Inc. has since changed its name to Volkswagen Products Corp. (hereinafter referred to as VPC).

granted to restore the competitive marketplace in air conditioners for Volkswagen automobiles.

The parties have been given the opportunity to present evidence and to fully argue to the Court the appropriate relief to be granted to overcome the anticompetitive effects of the acquisition.

VWoA has continued to oppose divestiture upon the ground that it—in the guise of VPC—is building the best available air conditioner for Volkswagen automobiles.[2] As compelling as that approach may seem, if the market we were considering was the automobile sales of VWoA, it simply misses the mark completely in the consideration that relief from an antitrust violation must be effective in the restoration of the competition affected by the merger or acquisition. United States v. du Pont & Co., 366 U.S. 316, 81 S.Ct. 1243, 6 L. Ed.2d 318 (1961); Ford Motor Company v. United States, 405 U.S. 562, 92 S. Ct. 1142, 31 L. Ed.2d 492 (1972). That competition is air conditioners for Volkswagen automobiles. Calnetics v. Volkswagen of America, Inc., *supra,* 348 F. Supp. at 617-618. Competition in air conditioners must be restored, maintaining the divested company as a viable competitor in the marketplace without the aid of the protective practices of a parent who is its sole customer.

To attempt to restore competition as it existed prior to the acquisition it is ordered that no later than six (6)

[2] Volkswagen automobiles as used in the context in which VWoA presents its position to the Court includes Type I—the commonly referred to "bug" or "beetle" and Karmann Ghia; Type II—the bus or van; Type III—the fastback or squareback; Porsche 911, Porsche 912 and Audi in its various models.

Also included in any use herein of the "Volkswagen automobile" appellation is any successor or replacement model of automobile manufactured or produced in whole or in part by Volkswagen Werk A.G., its successors or assigns.

months after the judgment herein shall become final,[3] VWoA shall divest itself of all interest in the assets and facilities of VPC for the production and distribution of air conditioners, parts and components thereof. Divestiture shall be accomplished in such manner that VPC and its production facilities shall remain as a going, viable and operating entity producing and distributing automobile air conditioners for Volkswagen automobiles. The divested assets shall include, but not be limited to, all the air conditioners, parts and components production and assembly facilities which were acquired by VWoA from Delanair Engineering Co., Inc. on September 26, 1969, together with all improvements, betterments, replacements and additions made thereto since such acquisition to the date of divestiture.

To guarantee the viability of the divested company, VWoA is required to use its best efforts to maintain the assets of VPC subject to divestiture as a going and viable concern engaging in the production and distribution of automobile air conditioners at the standards of operating efficiency and performance prevailing at June 30, 1972.

Competition, or at least the "competitive climate" the antitrust laws of the United States were enacted to protect, cannot survive in the near vacuum created by the acquisition which is the subject of this action. To provide what protection this Court can to the maintenance of a competitive market and to stabilize competition, VWoA and its wholly owned distributors, together with their respective successors and assigns, are, for a period of ten (10) years from the date of divestiture of the VPC assets, enjoined from manufacturing or assembling automobile air conditioners in the United States or any of its territories.

[3] Not subject to further appeal.

Plaintiff has proposed as part of the relief to be granted herein the further injunction of the importation into the United States of Volkswagen, Porsche or Audi automobiles having air conditioners installed thereon. VWoA has, nearly five months after plaintiff's proposal, raised for the first time the possibility that any restriction upon the importation of Volkswagen automobiles with air conditioners installed therein would be a violation of treaty obligations with the Federal Republic of Germany, particularly Article 16, Section 1 of the German/American Treaty of October 29, 1954, as well as Art. III, Para. 1 and Article I of the General Agreement on Tariffs and Trade (hereinafter referred to as GATT).[4]

Article XVI, Para. 1 of the German/American Treaty signed October 29, 1954 provides:

> "1. Products of either Party shall be accorded, within the territories of the other Party, national treatment and most-favored-nation treatment in all matters affecting internal taxation, sale, distribution, storage and use."

Article I, Para. 1 of GATT provides:

> "1. With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exporta tion, and with respect to all matters referred to in

[4] This comes in the form of a memorandum from the German Embassy to the U. S. Department of State. [See appended Exhibit A.]

paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties."

Article III of GATT provides in its pertinent part:

"1. The products of the territory of any contracting party imported into the territory of any other contracting party shall be exempt from internal taxes and other internal charges of any kind in excess of those applied directly or indirectly to like products of national origin. . . .

2. The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect to all laws, regulations and requirement affecting their internal sale, offering for sale, purchase, transportation, distribution, or use. * * * "

The treaty obligations of the United States are given constitutional recognition in Article VI, Clause 2 of the United States Constitution. It provides:

"This Constitution, and the Laws of the United States which shall be made in pursuance thereof, and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall

be bound thereby, any Thing in the Constitution or Laws of any State to the contrary not withstanding."

Treaties are thus given Supremacy over the Constitution or laws of any State, but the grant of Article VI is only in parity with the Constitution and Congressional enactments made in the exercise of the legislative power granted in Article I. As such the proscriptions of the Clayton Act, Section 7 [15 U.S.C. § 18] are entitled to construction in *pari materia* to any limitations of the treaties now urged upon the Court by defendants.

No where in the treaties cited to the Court is there any suggestion that either foreign or domestic business entities may engage in practices which are violative of the antitrust laws of the United States. To accept the position of VWoA that in an effort to stabilize the competition in automobile air conditioners for Volkswagen products the Court is prohibited by the cited treaties does not accord with the clear language of these treaties. They deal almost exclusively with *discriminatory* practices concerning the domestic and foreign products of the signatory nations. The Clayton Act, Section 7 [15 U.S.C. § 18] does not—in itself—or as applied by the Court here—discriminate against the products of Germany in favor of United States producers or manufacturers. This judgment is intended to deal with and is aimed at the maintenance of a free, open and competitive market in automobile air conditioners for Volkswagen automobiles. There can be no escape for defendant VWoA in the claim that it is insulated from its violation by any United States treaty with Germany.[5]

[5] This Court does not reach the question of the validity of a treaty that would purport to exempt foreign business from the reach of the antitrust laws of the United States. These treaties just do not approach the problem posed in this case.

Evidence has been presented by VWoA concerning the installation of air conditioning in Volkswagen products at the factory. It is clear that the concern for factory installed air conditioning is of recent vintage prompted largely by this litigation. To permit VWoA to now circumvent the effects of its wrongful conduct by changing only "the name of the game" is neither permissible nor desirable. Consequently for a period of seven (7) years from the date of divestiture of the VPC assets, VWoA and its wholly owned distributors, together with their respective successors and assigns are enjoined from importing into the United States for sale Volkswagen automobiles having air conditioners installed thereon.

Important as it may be, viability of the divested company is only one aspect of a Clayton Act, Section 7 divestiture. The primary purpose of the antitrust laws of the United States is not the survival or demise of a single company but rather the restoration and maintenance of a free competitive environment in which all companies—that can meet the competitive challenge—may have the opportunity to survive. The tool of a judgment—at a single moment in history—is totally inadequate to assure that a divested family member will not become the only supplier to the only real customer of Volkswagen automobile air conditioners. The Court must therefore fashion some flexible standard by which the business needs of a buyer can be compatible with the needs of the various possible suppliers in this market. Reserving to the Court the jurisdiction to amend—upon the presentation of empirical data of the inadequacies of the present limitations—VWoA and its wholly owned distributors, together with their respective successors and assigns shall be limited to procuring

from the purchaser of the divested assets of VPC not more than one half of their annual requirements of air conditioners. Annual requirements as used herein shall include the total number of air conditioners actually purchased or otherwise acquired by VWoA and its wholly owned distributors, together with their respective successors and assigns for resale to their distributors and/or dealers for installation in Volkswagen automobiles or for sale as a separate accessory item.

Divestiture shall be made in such manner that no interest, direct or indirect, shall be acquired or maintained by any officer, director, employee or agent of VWoA, nor to any person or entity that beneficially owns or has the power to vote, or controls, or has rights to own or control more than one percent (1%) of the outstanding shares of stock of VWoA. No transfer of assets of VPC shall be made by VPC to any person or entity in which VWoA or its wholly owned distributors together with their respective successors and assigns has a financial interest of any kind or nature. VWoA, its wholly owned distributor, together with their respective successor and assigns are perpetually enjoined from acquiring or reacquiring control over any of the divested assets.

VWoA shall—upon the negotiation of a sale of the assets herein ordered divested—and within sixty (60) days before the closing date of any sale—report to the Court—in writing and under seal—the name and address of the proposed purchaser together with all the terms and conditions of the proposed sale. VWoA shall simultaneously advise the Court—in writing and under seal—of all offers—and the terms and conditions of such offers—as may have been made by any person or entity for the purchase of the assets ordered divested herein.

Any contract of sale of the assets ordered divested herein shall provide that the person or entity together with their successors or assigns acquiring the divested assets shall not for a period of ten (10) years use the name Volkswagen in its corporate style or use the Volkswagen logo or trademark as part of its marketing efforts for automobile air conditioners. The contract shall further provide that any person or entity together with their successors or assigns acquiring the divested assets shall be bound by the terms of this judgment together with any additions or amendments hereafter made.

As part of the relief sought plaintiff asks payment of its attorneys' fees in successfully prosecuting the Clayton Act, Section 7 aspect of this litigation. The authority for the relief granted plaintiff herein is found in Section 16 of the Clayton Act [15 U.S.C. § 26] which provides in its pertinent part:

> "§ 26. Injunctive relief for private parties; exception
>
> Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States . . . ."

Nothing in the statutory scheme for injunctive relief expressly provides for the grant of attorneys' fees. But the statutory provision for injunctive relief does provide for the application of general equitable principles to the determination of the relief to be granted when it goes on to say:

> ". . . [U]nder the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by the courts of equity . . . ."

Generally American courts have been in accord that attorneys' fees are not recoverable for the equitable aspects of litigation. Allen Bradley Co. v. Local No. 3, International Brotherhood of Electrical Workers, 51 F.Supp. 36 [S.D.N.Y. 1943], rev'd on other grounds 145 F.2d 215 (2d Cir. 1944); Talon, Inc. v. Union Slide Fastener, Inc., 266 F.2d 731 (9th Cir. 1959); Gillam v. A. Shyman, Inc., 205 F.Supp. 534 (D.Alaska 1962); Transworld Airlines, Inc. v. Hughes, 312 F.Supp. 478 [S.D.N.Y.1970]; Semke v. Enid Automobile Dealers Association, 320 F.Supp. 445 (W.D.-Okl.1970); Milgram v. Loew's Inc., 192 F.2d 579 (3d Cir. 1951); Decorative Stone Co. v. Building Trades Council of Westchester County, 23 F.2d 426 (2d Cir. 1928); Alden-Rochelle, Inc. v. American Society of Composers, Authors & Publishers, 80 F.Supp. 888 (S.D.N.Y.1948); Ring v. Spina, 84 F.Supp. 403 [S.D.N.Y.1949], modified sub nom. Ring v. Authors' League of America, Inc., 186 F.2d 637 (2d Cir. 1951), cert. denied, 341 U.S. 935, 71 S.Ct. 854, 95 L.Ed. 1363 (1951).

More recent considerations by the Supreme Court of the United States of this most difficult problem indicate that the authorities in general accord upon the denial of attorneys' fees for solely equitable relief are subject to exceptions. Some of the exceptions were articulated in Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714 87 S.Ct. 1404, 18 L.Ed.2d 475 (1967). The principles are summarized when the court says at page 718, 87 S.Ct. at p. 1407:

> ". . . They have been sanctioned by this Court when overriding considerations of justice seemed to compel such a result."

We must then turn to the nature of the case at hand to determine whether within the broad exception noted in *Fleischmann, supra,* there are "overriding considerations of justice" which should properly permit the assesment of attorneys' fees within the general equity jurisdiction of this Court recognized in the Clayton Act, Section 16 [15 U.S.C. § 26].

No lawyer with any modicum of experience in the trial of antitrust cases can fail to realize that a damage recovery —though conceivable—is highly unlikely in the prosecution of a Clayton Act, Section 7 [15 U.S.C. § 18] violation. The purpose, if any, in prosecuting such a claim is to obtain for the competitor an environment of a free and unencumbered marketplace. If successful the plaintiff secures not only for itself but for all competitors—actual and prospective—the benefits intended in the enactment of the antitrust laws of the United States. This Court recognized the fallout benefit of plaintiff's suit herein when it said;

> "Equitable relief presents different considerations. A case for divestiture is one in which a single competitor is but one element in the mosaic of competition. Divestiture affects all of the competitors in the marketplace and so all must be considered in the determination of violation vel non. Section 7 of the Clayton Act [15 U.S.C. § 18] was not enacted to equate 'competition' with 'survival' of a single entity but rather to provide the opportunity to freely enter and engage in the marketplace. In this respect there is no 'target' at which to aim the anticompetitive acquisition. Competitors are victims of the fallout of the destruction of competition. A viable plaintiff competing in, or ready to enter into the marketplace gives the Court the cause for inquiry. *The inquiry is*

> *the marketplace and the effects of the claimed anticompetitive acquisition upon the marketplace. For that reason a Section 7 divestiture plaintiff acts somewhat as a Rule 23 class representative and need not satisfy the requirement of 'impact' in its classical antitrust definition.* In a nation that now exceeds one trillion, forty six billion dollars in gross national product, government cannot possibly be relied upon to provide vindication of every person or entity aggrieved by a violation of the antitrust laws. It must be left to private litigants to guarantee to themselves the assurance that the future will not repeat the past . . ." (Emphasis added.) Calnetics Corporation v. Volkswagen of America, Inc., 348 F.Supp. 606, 620 (C.D.Cal.1972).

Though discussing a statute providing for attorneys' fees in Civil Rights cases the language of the Supreme Court in Newman v. Piggie Park Enterprises, 390 U.S. 400, 88 S.Ct. 964, 19 L.Ed.2d 1263 is particularly apt. The Court there says at page 402, 88 S.Ct. at page 966:

> ". . . When a plaintiff brings an action under that Title, he cannot recover damages. If he obtains an injunction, he does so not for himself alone but also as a 'private attorney general', vindicating a policy that Congress considered of the highest priority. If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive power of the federal courts."

Exhibit A

Plaintiff herein in the role of "private attorney general" has vindicated a policy of compelling national economic interest—in the prosecution of an action in which this Court has found a violation of the Clayton Act, Section 7 [15 U.S.C. § 18]. The benefit belongs to the marketplace bringing plaintiff's claim for attorneys' fees within the principles of Sprague v. Ticonic National Bank, 307 U.S. 161, 59 S.Ct. 777, 83 L.Ed. 1184 (1939) and the "overriding considerations of justice" stated in *Fleischmann, supra.* VWoA shall pay to plaintiff the sum of $100,000 as its attorneys' fees in the prosecution of this litigation.

Jurisdiction of this cause is retained by this Court to enable the parties to apply at any time for such further orders or directions as may be necessary or appropriate for the construction or execution of this judgment, for modification of any of the provisions thereof, for the enforcement of compliance therewith and the punishment of violations thereof.

VWoA shall pay to plaintiff its taxable costs herein.

This memorandum opinion and order is the judgment and shall be entered by the Clerk accordingly.

Exhibit A

[Text of Memorandum from German Embassy to U. S. Department of State]

German Embassy
Washington, D. C.
Hi/ag

Exhibit A

NOTE VERBALE

The Embassy of the Federal Republic of Germany presents its compliments to the Department of State and has the honor to draw the attention of the Department of State to the following matter:

It has come to the attention of this Embassy that there is presently pending in the U.S. District Court for the Central District of California before Honorable Manuel Real in the case of Calnetics v. Volkswagen of America, Inc. et al. (No. 70-2185-R), a proceeding which is of concern to citizens and business organizations of the Federal Republic of Germany as well as the German Government.

The Embassy understands that the court in that case has found Volkswagen of America, Inc., the franchise importer of Volkswagen, Audi and Porsche vehicles, has violated section 7 of the Clayton Act on its acquisition in 1969 of the Delanair Corporation, a company which manufactured air conditioners to be installed in VW vehicles as added equipment after importation.

As part of the relief for the violations found by the court, the court is considering to prohibit Volkswagen of America, Inc. for ten years from importing into the United States any Volkswagen, Audi or Porsche vehicles with factory installed air conditioning.

The Embassy has of course no intention to influence the determination of American courts on matters within their competence and therefore limits comment to the proposal mentioned above.

It objects to this proposal which heavily discriminates against German citizens and German industry and, in its opinion, violates Article 16, Section 1, of the German/American Treaty of October 29, 1954 as well as Article III, Para. 1 and Article I of GATT.

Exhibit A

To prevent importation of automobiles with factory-installed air conditioners discriminates both against German manufacturers of the vehicles and also German manufacturers of air conditioners for installation in vehicles. To impose the prohibition under consideration by the court would unfairly apply to these manufacturers sanctions in a dispute in which they were not a party.

The Embassy is informed that the decision to which objection is made will be before the court on November 15, 1972.

The Embassy repeats that it has no desire to interfere in a pending procedure before American courts. It would however be grateful if the above mentioned arguments could be brought to the attention of the appropriate authorities.

The Embassy of the Federal Republic of Germany avails itself of this opportunity to renew to the Department of State its assurance of its highest consideration.

Washington, D. C.
November 10, 1972

To the
Department of State

APPENDIX G

Opinion

Filed February 24, 1976

UNITED STATES COURT OF APPEALS

NINTH CIRCUIT

Nos. 73-1954, 73-1953, 73-1955 to 73-1958

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CALNETICS CORPORATION and MEIER-LINE, INC.,
Appellants,

v.

VOLKSWAGEN OF AMERICA, INC., *et al.*,
Appellees.

CALNETICS CORPORATION,
Appellee,

v.

VOLKSWAGEN OF AMERICA, INC., *et al.*,
Appellant (five cases).

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Before BARNES, CHOY and GOODWIN,
Circuit Judges.

Feb. 24, 1976.

*Per Curiam**

Volkswagen of America, Inc. (VW), and its wholly owned subsidiary, Volkswagen Products Corporation (Subsidiary), defendants in a private antitrust action brought

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* Because of the number and complexity of the issues, all members of the panel participated in the writing of this opinion.

by Calnetics Corporation,[1] appeal a district court judgement ordering VW's divestiture of Subsidiary and other equitable relief. VW and Subsidiary also appeal a summary judgment dismissing their counterclaims against Calnetics, and an award of attorneys' fees and costs to Calnetics.

Calnetics cross-appeals from summary judgments and a directed verdict dismissing its claims for damages against VW Subsidiary, and Volkswagen Pacific, Inc. (Distributor), an independently owned corporation which until 1973[2] distributed VW-imported automobiles and accessories in southern California, southern Nevada, Arizona, and Hawaii.

Distributor appeals from the district court's denial of its motion to amend its answer to add a counterclaim under § 2(c) of the Robinson-Patman Act, 15 U.S.C. § 13(c).

The summary judgment in favor of Calnetics on each of VW's counterclaims is affirmed, as is the summary judgment in favor of Calnetics on Subsidiary's counterclaim based on the Sherman Act, 15 U.S.C. § 1 *et seq.* All other judgments challenged on appeal are reversed. The district court's denial of Distributor's motion to add a counterclaim under 15 U.S.C. § 13(c) is also reversed. The district

[1] Meier-Line, Inc., a wholly owned subsidiary of Calnetics Corp., was added to the complaint as an additional plaintiff pursuant to an uncontested motion during the district court's hearing on equitable relief. "Calnetics" in this opinion refers both to Calnetics Corp. and to Meier-Line, Inc. Throughout this opinion, for convenience, all actions taken by Meier-Line will be attributed to Calnetics.

[2] VW and Subsidiary represent in their brief that Distributor abandoned its distribution franchise in 1973 and that VW now sells directly to the dealers in Distributor's former franchise area.

court's award of attorneys' fees and deposition copy costs to Calnetics is set aside. A legend of the parties and claims appears in the margin.[3]

[3] Chart of the causes of action and dispositions:
Parties:
VW—Volkswagen of America, the wholly owned subsidiary of Volkswagenwerk, A.G.—handles all American deals.
Subsidiary—Volkswagen Products Corp., an air-conditioning manufacturer acquired by VW.
Calnetics—a competing air-conditioning manufacturer that previously sold to Distributor.
Distributor—Volkswagen Pacific, Inc., an independently owned distributor of VW products—the buyer of the air-conditioning units in this case.
Delta—another air-conditioning manufacturer, not a party to these proceedings.
Meier-Line—a subsidiary of Calnetics (see note 1, *supra*).

(Footnote 3 continued)

	Complainant	Respondent	Cause of Action	Relief Sought	Disposition: District Court	Disposition: 9th Circuit	Location of Discussion in Opinion
1.	Calnetics & # Meier-Line	VW, Subsidiary	§ 7, Clayton	Damages	Directed verdict for VW & Subsidiary	Reversed	I. B.
				Equitable relief	Divestiture	Reversed	III. C. 1
					Import ban	Questioned	III. C. 3
					Other remedies	Questioned	III. C.
2.	Calnetics	VW, Subsidiary	§§ 1, 2, Sherman	Damages	Sum. judg.* for VW & Subsidiary	Reversed	I. D.
				Equitable relief	Sum. judg.* for VW & Subsidiary	Reversed	I. D.
3.	Calnetics	Distributor	§§ 1, 2, Sherman	Both	Sum. judg. for Distributor	Reversed	I. A.
4.	VW, Subsidiary	Calnetics	§§ 1, 2, Sherman § 2(c), Clayton	Both	Sum. judg. for Calnetics	Affirmed**	I. C.
5.	Distributor	Calnetics	§ 2(c), Robinson-Patman Pendent claims	Damages?	Denied leave to amend answer so as to assert cause of action	Reversed	V.
6.	.....	.....	.....	.....	Attorney fee for Calnetics	Reversed	IV. A.
7.	.....	.....	.....	.....	Costs for Calnetics	Reversed	IV. B.

* After vacating an earlier denial of summary judgment for VW and Subsidiary.
** Summary judgment for Calnetics on Subsidiary's non-Sherman Act counterclaims was vacated and remanded.

VW, a wholly owned subsidiary of the German automobile manufacturer (Volkswagenwerk A.G.), imports Volkswagen, Porsche, and Audi automobiles into the United States. On September 26, 1969, VW acquired a manufacturer of automobile air conditioning equipment, and changed its name to Volkswagen Products Corporation (Subsidiary). Approximately one year later, Calnetics, an independent manufacturer of automobile air conditioning equipment which previously sold to Distributor, brought suit alleging that VW's acquisition of Subsidiary violated § 7 of the Clayton Act, 15 U.S.C. § 18.

The allegation of a § 7 violation was premised mainly on a theory of vertical restraint[4]—that VW would be able to coerce both its wholly owned and indirectly controlled distributors and dealers to satisfy their demand for automobile air conditioning equipment from Subsidiary's supply, thus foreclosing sales opportunities of Calnetics and other independent air conditioning manufacturers (hereinafter referred to generically as "Delta"). Calnetics also alleged that VW, Distributor, and Subsidiary[5] had conspired and combined to restrain competition in the manufacture, distribution, and sale of air conditioning systems for Volkswagen, Karmann Ghia, and Porsche automobiles

[4] In addition to a traditional theory of vertical restraint, Calnetics also urges that the acquisition diminished competition because: (1) as a subsidiary, Subsidiary enjoyed access to more money and engineering talent than it had as an independent company; (2) as a subsidiary, Subsidiary enjoyed the benefits of engineering coordination with the parent automobile manufacturer; and (3) the acquisition eliminated the acquired firm as a potential competitor.

[5] Calnetics urges that VW and Distributor combined and conspired with Subsidiary's predecessor corporation prior to September 26, 1969, the date of the acquisition, and with Subsidiary thereafter. Throughout the rest of this opinion, "Subsidiary" will refer both to Subsidiary and to the predecessor corporation.

in violation of § 1 of the Sherman Act, 15 U.S.C. § 1, and had actually monopolized and attempted to monopolize the distribution, manufacture, and sale of air conditioning systems in violation of § 2 of the Sherman Act, 15 U.S.C. § 2.

Calnetics sought both damages and equitable relief, including divestiture of Subsidiary. Its claims for damages under the Sherman and Clayton Acts were premised entirely on its exclusion from competition for the sale of automobile air conditioning equipment to Distributor.

VW and Subsidiary counterclaimed, alleging that a secret agreement between Calnetics and the head of Distributor's service department, R. W. Christiansen, which provided Christiansen and his wholly owned corporation, RWC Sales Corp. with a 3% commission on all sales to Distributor, violated §§ 1 and 2 of the Sherman Act, § 2(c) of the Robinson-Patman Act,[6] and California state law. VW and Subsidiary sought both damages and equitable relief. Distributor filed a counterclaim based on state law, but was not allowed to amend its answer to include a counterclaim under the Robinson-Patman Act.

On February 28, 1972, the trial court granted Distributor's motion for summary judgment on all claims against it,[7] but rejected motions for summary judgment by VW and Subsidiary. The court also granted Calnetics' motion for summary judgment on the counterclaims brought by VW and Subsidiary.

After the February 28 summary judgments, the only claims remaining to be tried were those by Calnetics against VW and Subsidiary under §§ 1 and 2 of the Sherman Act and § 7 of the Clayton Act. The district court had earlier

[6] 15 U.S.C. § 13(c).

[7] Having thus eliminated all federal claims between Distributor and Calnetics, the district court dismissed the pendent state law claims between Distributor and Calnetics.

ordered that the § 7 claim be tried separately from, and prior to, the Sherman Act claims. Accordingly, a jury trial commenced April 4, 1972 on the § 7 claim.

Upon the conclusion of Calnetics' case in chief, the district court directed a verdict in favor of VW and Subsidiary on the issue of damages, dismissed the jury, and proceeded to hear further evidence on Calnetics' claim for equitable relief.

On June 30, 1972, the district court held that VW's acquisition of Subsidiary violated § 7 of the Clayton Act. *Calnetics Corp.* v. *Volkswagen of America, Inc.*, 348 F.Supp. 606 (C.D.Cal.1972). It granted judgment for Calnetics but deferred the execution of the relief until the parties had presented "plans for accomplishing the [equitable] relief granted * * *." 348 F.Supp. at 623.

On July 10, 1972, the district court granted summary judgment in favor of VW and Subsidiary on the postponed Sherman Act Claims. *Calnetics Corp.* v. *Volkswagen of America, Inc.*, 348 F.Supp. 623 (C.D.Cal. 1972).

On January 19, 1973, the district court issued a supplemental order which: provided for VW's divestiture of Subsidiary; enjoined VW and its wholly owned subsidiaries for a period of seven years from importing into the United States any Volkswagen, Porsche, or Audi automobiles equipped with factory-installed air conditioning; imposed a 10-year ban on domestic manufacture and assembly of automobile air conditioners by VW; and permanently enjoined VW and its wholly owned distributors from satisfying more than 50% of their need for automobile air conditioners from the output of the divested firm. *Calnetics Corp.* v. *Volkswagen of America, Inc.*, 353 F.Supp. 1219 (C.D.Cal.1973).

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I. Damage Claims Against VW, Subsidiary, and Distributor; Counterclaims of VW and Subsidiary.

VW and Subsidiary argue that all the summary dispositions in their favor and in favor of Distributor are correct. VW and Subsidiary also argue that even if only one of the three summary dispositions in favor of them or Distributor is correct VW and Subsidiary are necessarily entitled to summary dismissal of all the plaintiff's damage claims. Finally, VW and Subsidiary argue that if all three summary dispositions in favor of them or Distributor are erroneous then Calnetics' entire § 7 claim, which sought both damages and equitable relief, must be remanded for a jury trial. With respect to their counterclaims, VW and Subsidiary urge that the summary judgment in favor of Calnetics was erroneous.

Calnetics argues that the three summary dispositions in favor of Distributor, VW, and Subsidiary were erroneous. It does not respond directly, however, to VW and Subsidiary's argument that the consequence of that error is that VW and Subsidiary become entitled to a jury trial on the entire § 7 claim. (Calnetics implicitly concedes that the defendants can have a jury trial, because Calnetics asserts error in the summary judgments against Calnetics on the damages claims.)

We consider first Calnetics' challenges to the summary dispositions of its damages claims against VW, Subsidiary, and Distributor. In conjunction with our analysis of these challenges, we will also consider VW's and Subsidiary's challenge to the summary judgment dismissing their counterclaims against Calnetics.

A. *Summary Judgment in Favor of Volkswagen Pacific, Inc., (Distributor) on Calnetics' Antitrust Claims.*

Calnetics had alleged that Distributor conspired with VW and Subsidiary (1) unreasonably to restrain trade and commerce in the business of marketing air conditioners for

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Volkswagen automobiles in violation of § 1 of the Sherman Act, and (2) to monopolize said trade and commerce in violation of § 2 of the Sherman Act. After the submission of numerous documents, depositions, and affidavits, and the presentation of oral and written arguments, the court made extensive findings of fact and concluded that Distributor had not violated the antitrust laws.

The court's critical finding (No. 17) stated:

> "* * * By reason of the problems with and dealer complaints received concerning the * * * [Calnetics] air-conditioners, the refusal of many * * * [Distributor] dealers to purchase those units, and the widespread success of * * * of * * * [Delta] in the * * * [Distributor] area, in the fall of 1969 * * * [Distributor] determined, in its *independent business judgment* to cease handling * * * [Calnetics] air-conditioners on an exclusive basis and to distribute the full line of * * * [Delta] air-conditioners. This decision reflected a policy decision by * * * [Distributor] that it was in its interests and those of the dealer and Volkswagen purchaser to have a choice of air-conditioners for each type of automobile." (Emphasis added.)

Although the "independent business judgment" finding seems to have been the basis for the court's summary judgment order on February 28, 1972,[8] the court reconsidered finding No. 17 on May 31, 1972, and replaced it with the following:

> "* * * [T]here is no credible evidence that * * * [Distributor's] ceasing to handle * * * [Calnetics]

[8] It is well settled that an independent business decision to cease doing business with a particular supplier or distributor is lawful. *See, e. g., Scanlan v. Anheuser-Busch, Inc.*, 388 F.2d 918, 921 (9th Cir.), *cert. denied*, 391 U.S. 916, 88 S.Ct. 1810, 20 L.Ed.2d 654 (1968).

> air-conditioners on an exclusive basis or at all was the result of any combination or conspiracy by * * * [Distributor] resulting from its *voluntary* act or acts." (Emphasis added.)

Taking into consideration the February 28 findings along with the May 31 amendments, we conclude that the district court's final rationale for the summary judgment order was *not* that Distributor had exercised independent business judgment in ceasing to handle Calnetics' air conditioners, but that the cessation of business was not the result of a combination or conspiracy resulting from any *voluntary* act on the part of Distributor.

In making the May 31 amendment, the court apparently realized that, if the summary judgment in favor of Distributor was based on the independent-business-judgment rationale, it must also grant summary judgment in favor of VW and Subsidiary on the § 7 claim for damages. However, the court did not grant summary judgment in favor of VW or Subsidiary, and, to make its rulings consistent, reconsidered the Distributor findings and amended them so that the Distributor summary judgment would be based on grounds of lack of voluntariness. In doing so, however, the court adopted an erroneous theory. The involuntary nature of one's participation in a conspiracy to monopolize is no defense. An antitrust conspirator can be liable for damages even though he participates only under coercion. *Flintkote Co.* v. *Lysfjord,* 246 F.2d 368, 375 (9th Cir.), *cert. denied,* 355 U.S. 835, 78 S.Ct. 54, 2 L.Ed.2d 46 (1957); *Otto Milk Co.* v. *United States Dairy Farmers Cooperative Ass'n,* 261 F.Supp. 381, 385 (W.D.Pa.1966), *aff'd,* 388 F.2d 789 (3d Cir. 1967).

Although the court in granting summary judgment misapplied substantive law, the judgment should not be reversed if it is correct for some other reason. *See*

Archer v. *United States,* 217 F.2d 548, 551 (9th Cir. 1954), *cert. denied,* 348 U.S. 953, 75 S.Ct. 441, 99 L.Ed. 745 (1955); 6 J. Moore, Federal Practice ¶ 56.27[1], at 2975 (2d ed. 1948, *as amended,* 1975). Thus, we must reach Distributor's argument that summary judgment was correct because Calnetics failed to produce any credible evidence from which a jury could reasonably infer conspiracy in restraint of trade.[9] According to Distributor, the *only* reasonable inference that could be drawn from the undisputed facts was the one the trial judge first drew: that Distributor ceased doing business with Calnetics for purely independent business reasons.

In support of its claim that a genuine issue exists as to Distributor's motivation, Calnetics points to certain undisputed evidence: (1) that in June, 1969, Distributor issued a 10,000-unit purchase order to Calnetics for the 1970 model; (2) that VW acquired Subsidiary on September 26, 1969; (3) that VW urged Distributor to purchase Subsidiary's air conditioners, but at that time Distributor told VW that it was "satisfied" with its present suppliers; (4) that after an October 15, 1969, meeting between VW, Subsidiary, and Distributor executives, Distributor promised that it would join VW's and Subsidiary's marketing efforts; (5) that Subsidiary could not satisfy the total air-conditioning demands of Volkswagen dealers in 1970; (6) that in November, 1969, Distributor placed a 1500-unit order to Calnetics, effectively replacing the 10,000-unit purchase order of June; (7) that in early 1970 Distributor notified Calnetics of its intent to cancel the 1500-unit order; (8) that in the beginning of the 1971 model year Subsidiary was

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[9] Distributor, in support of its summary judgment motion, never relied on the lack of voluntariness argument, and in its appellate brief chose to ignore the court's May 31 order and rest its case solely on the ground that no genuine issue of material fact exists.

"back on the right track"; and (9) that on September 28, 1970, just prior to the 1971 model year, Distributor's service manager wrote to one of its representatives that "[Distributor] is going 100% to Volkswagen Products Corp. [*i. e.*, Subsidary] air conditioner units for 1971."

Despite Calnetics' arguments to the contrary, the evidence tending to show that Distributor dropped Calnetics as a supplier for purely independent business reasons is substantial and appears strong in comparison with Calnetics' inferences of conspiratorial intent. The dissatisfaction of Distributor and retail dealers with the Calnetics products is well documented, as is Calnetics' rejection of 25% of warranty claims submitted to it, its failure to deliver air conditioners on time, its weak financial condition, and the success of Delta, another manufacturer, in taking business away from Distributor by selling direct to dealers. Further, Calnetics does not dispute the court's finding that Distributor, as a result of the problems it experienced with Calnetics' products, "had no desire to purchase additional * * * [Calnetics] air conditioners * * *." Also tending to show the lack of conspiratorial purpose is the fact that Delta, not Subsidiary, supplied Distributor with the vast majority of the 1970 model-year units which Calnetics claimed it would have supplied but for the conspiracy between VW, Subsidiary, and Distributor.[10]

If this appeal were from a jury verdict in favor of Distributor, our inquiry would be limited to the presence of evidence sufficient to support the verdict. However, the claim against Distributor was never presented to a jury. It was decided by the court on summary judgment. Our

[10] The extent to which Delta and not Subsidiary replaced Calnetics as a supplier to Distributor is also critical to a determination of damages, if any, suffered by plaintiff. See Part B, *infra*.

inquiry, therefore, is not whether there is substantial evidence supporting a finding of independent business purpose, but whether no reasonable jury could have found that Distributor participated in a conspiracy to restrain trade. The burden is on the party moving for summary judgment to show the absence of any genuine issue of material fact,[11] and, in determining whether the burden has been met, we must draw all inferences of fact against the movant and in favor of the party opposing the motion. *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 394 U.S. 495, 505, 89 S.Ct. 1252, 1259, 22 L.Ed.2d 495, 506 (1969); *DeVoto* v. *Pacific Fidelity Life Ins. Co.*, 516 F.2d 1, 5 (9th Cir.), *cert. denied*, 423 U.S. 894, 96 S.Ct. 194, 46 L.Ed.2d 126 (1975); *Saxony Products, Inc.* v. *Guerlain, Inc.*, 513 F.2d 716, 719 n.6 (9th Cir. 1975).

These general standards for the granting of summary judgment become even more strict in the antitrust context. As the Supreme Court observed in *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464, 82 S.Ct. 486, 7.L.Ed.2d 458 (1962):

> "* * * We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot * * *. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised.

[11] Summary judgment is proper only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56.

> Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of 'even handed justice.' " 368 U.S. at 473, 82 S.Ct. at 491, 7 L.Ed.2d at 464.

The key contested issue in the claims against Distributor is motive or intent, and plaintiff should have an opportunity to let the jury draw its own references from the undisputed facts unless all reasonable inferences that could be drawn defeat plaintiff's claims. Despite cogent evidence of independent business reasons for Distributor's actions, the fact remains that VW enjoyed a special supplier-purchaser relationship with Distributor and that, in the two model years after VW's acquisition of Subsidiary, the Subsidiary air conditioners—considered unfit when they were produced by Subsidiary's predecessor corporation—made substantial inroads into the Distributor market which had been held exclusively by Delta and plaintiff.

Mindful of the Supreme Court's admonition in *Poller* v. *Columbia Broadcasting System, Inc., supra,* and viewing the evidence as a whole and in a light most favorable to Calnetics, we cannot say that no reasonable jury could have found that Distributor participated in a conspiracy in restraint of trade which resulted in a decision to terminate dealings with plaintiff.[12] Thus, a genuine issue of material fact exists and it is for the jury alone to decide whether Distributor's cessation of business with Calnetics was motivated by independent business reasons or by participation in an illegal conspiracy.[13]

[12] As discussed in Part B, *infra,* another reasonable conspiracy theory that the jury should have an opportunity to consider is that Distributor's initial decision to drop Calnetics was for independent business reasons, but that once Subsidiary was rehabilitated the unlawful foreclosure commenced and Calnetics was prevented by the conspiracy from re-entering the market. If the jury so finds, damages must be calculated from the moment of foreclosure rather than from the date of the acquisition.

We vacate the summary judgment in favor of Distributor on Calnetics' antitrust claims, and remand the case for trial.

B. *Directed Verdict in Favor of VW and Subsidiary on the Clayton Act § 7 Claim for Damages.*

At the conclusion of Calnetics' case in chief on its claim for damages under § 7 of the Clayton Act, the court granted defendant VW's motion for a directed verdict. The court based its ruling upon its finding that the jury could not reasonably have found a direct and immediate causal connection between VW's acquisition of Subsidiary and Calnetics' alleged damages.

The standard for review of the grant of a directed verdict is identical to that for review of a summary judgment order. The appellate court must view the evidence, including all reasonable inferences of fact, in a light most favorable to the party against whom the motion for di-

[13] The fact that the trial court did not grant summary judgment in favor of VW and Subsidiary on Calnetics' § 7 claims tends to indicate that the court also concluded that a genuine issue of fact existed as to the reason for Distributor's dropping of Calnetics as a supplier. In any event, Calnetics' evidence of conspiracy is not so insubstantial as to warrant summary judgment against it.

To avoid inconsistent results, the district court should bear in mind that the § 7 damage claims and the Sherman Act claims against Distributor, VW, and Subsidiary are all interrelated. Consequently, a jury finding that Distributor made an independent, *long-term* business judgment to cease doing business with plaintiffs would defeat each and every one of plaintiff's damage claims.

rected verdict was made. *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 696, 82 S.Ct. 1404, 1409, 8 L.Ed.2d 777, 782 (1962); 5A J. Moore, Federal Practice ¶ 50.02[1], at 2326-27 (2d ed. 1948, *as amended* 1975).

The order for a directed verdict does not clearly indicate the facts upon which the court based its lack-of-causation finding. Conceivably, the court entered its order upon the belief that the evidence conclusively showed that Distributor's termination of business dealings with plaintiffs resulted from the exercise of independent business judgment rather than from participation in a conspiracy. But, as pointed out by VW and Subsidiary, at the time the court ordered a directed verdict, there had been only oblique reference to independent business reasons for Distributor's actions. Therefore, according to VW and Subsidiary, the court must have based its lack-of-causation conclusion on the fact that Calnetics was displaced as Distributor's supplier not by Subsidiary but by Delta. Since we have already concluded that a genuine issue exists as to Distributor's motivation in terminating its business dealings with Calnetics, the directed verdict in favor of VW and Subsidiary can stand only if no reasonable jury could have found that Subsidiary was responsible for *any* of plaintiff's alleged losses.

In model year 1969, Calnetics sold approximately 4000 units to Distributor, while Delta, selling at that time directly to Volkswagen dealers, sold no units to distributor. Then, in the fall of 1969, Distributor stated that it would use both Calnetics and Delta as exclusive suppliers for the coming model year. Subsequently, on October 30, 1969, soon after VW's acquisition of Subsidiary, Distributor did order 125 air-conditioner units from Subsidiary. In the months immediately following, additional units were sold

by Subsidiary to Distributor, but not in the quantity delivered by Calnetics and Delta. From October 1969 through April 1970, Calnetics supplied 1800 units, Delta 1643, and Subsidiary 460. After April 1970, Subsidiary's sales to Distributor picked up dramatically, and Subsidiary's total sales to Distributor for 1970 amounted to 2024 units. Delta meanwhile sold a total of 4225 units to Distributor in 1970. In contract to Delta's good sales year, Calnetics sold no additional units to Distributor after April 1970.

In viewing the above evidence, the parties take extreme positions. According to defendants VW and Subsidiary, the evidence proves conclusively that Delta alone displaced Calnetics and, thus, no damages whatsoever resulted from the challenged acquisition, plaintiff Calnetics, on the other hand, boldly claims that but for the acquisition it would have sold Distributor 4800 units in 1970 and another 6500 units in 1971.

Distributor's dissatisfaction with Calnetics' air conditioners and its reliance on Delta as its primary supplier for 1970 provide evidence that Calnetics was not in any way foreclosed from the Distributor market by a conspiracy among VW, Subsidiary, and Distributor. However, viewing all the evidence in a light most favorable to plaintiff, we cannot say that no reasonable jury could have found at least some damages resulting from the acquisition.

In the first place, a jury could have found that some of Subsidiary's sales to Distributor for the 1970 and 1971 model years were made only as a result of conspiratorial conduct and were made at the expense of Calnetics. Further, even if a jury were to conclude that Subsidiary did

not foreclose Calnetics from the Distributor market in the months immediately following the acquisition, we cannot say that no jury could have found an unlawful foreclosure commencing at a later time.[14] The fact, if it is a fact, that the alleged foreclosure here may not have taken effect until after the rehabilitation of Subsidiary or at some other time does not bar a claim for damages for the "postponed" foreclosure. *Cf. United States* v. *E. I. duPont de Nemours & Co.*, 353 U.S. 586, 597, 77 S.Ct. 872, 879, 1 L.Ed.2d 1057, 1069 (1957). Of course, damages must be calculated from the time the foreclosure commenced rather than from the time of acquisition.

As for plaintiff's claim that it would have sold 4800 units to Distributor in 1970 and 6500 in 1971, on retrial plaintiff's recovery, if any, must be limited to damages suffered as a result of sales lost *to the alleged coconspirator-supplier* (Subsidiary). Calnetics alleges that but for the conspiracy it would have sold Distributor about 3000 more units in 1970 than it actually sold. This is obviously wrong, because Subsidiary's total sales to Distributor in 1970 amounted to only 2024 units. Assuming *arguendo* that Calnetics can prove a conspiracy in restraint of trade which resulted in Distributor's purchasing Subsidiary's units, Calnetics nonetheless may not recover from Distributor for sales lost to an innocent competitor (Delta).[15] The requirement that causation be proved for damages means that Calnetics may not recover on a calculation of lost sales

[14] *See* note 12, *supra*.

[15] Delta has not been charged with nor connected in any way with a conspiracy in restraint of trade. Delta has instituted its own antitrust suit against defendants based on an alleged unlawful foreclosure from the air-conditioner market.

in a given year exceeding sales made by Subsidiary to Distributor in that same year. Thus, for example, damages in 1970 may not be based on lost sales in excess of 2024 units —the number of units Subsidiary sold to Distributor.

VW and Subsidiary make an alternative argument that, even if causation was proved, the evidence of damages was too unreliable and speculative to allow recovery. Except as to the causation problems discussed *supra*, we believe that a discussion of the adequacy of evidence of damages is premature.[16]

The directed verdict was error. We vacate the judgment based on it, and remand the § 7 claim for a jury trial.

C. *Summary Judgments in Favor of Calnetics on VW's and Subsidiary's Counterclaims.*

The defendants' counterclaims had all been predicated on the commission arrangement between Christiansen (Distributor's service manager) and Calnetics. In entering summary judgment in favor of Calnetics, the court found:

> "* * * That the decision by defendant Volkswagen Pacific, Inc. [the Distributor] to discontinue the promotion of the * * * [Subsidiary] air-conditioning systems was not causally related in any way to the entering into a sales commission agreement between plaintiff and * * * [Christiansen]."

As was the case with Distributor's decision to drop Calnetics as a supplier in 1970,[17] the facts surrounding the de-

[16] Plaintiffs may base damages figures on 1969 model-year sales, even assuming *arguendo* that they were "illegal" sales. *See* Part I. D., *infra*.

[17] *See* Part I. A., *supra*.

cision to drop Subsidiary in 1968 are complex and subject to various interpretations. The district court itself was apparently confused by the contradictory claims and conflicting evidence of the opposing parties. It was led into making two totally inconsistent findings as to the causal relationship between the agreement and Calnetics' sales. The counterclaim finding quoted above cannot be reconciled with finding No. 31, entered on August 1, 1972, when the court dismissed Calnetics' Sherman Act claims:[18]

> "* * * As a direct and proximate consequence of the agreement between Christiansen and plaintiff and the payments made to Christiansen in accordance with its terms, competitive suppliers of air conditioners for Volkswagen automobiles, including [VW], were excluded during the 1969 model year from selling air conditioners."

Considering the trial court's own difficulty with this important factual dispute and viewing the evidence in a light most favorable to the parties opposing the summary judgment (VW and Subsidiary), we conclude that a genuine issue as to causation exists.

It is undisputed that Christiansen, who was Distributor's service manager from 1967 to November 1969, entered into a written agreement in the fall of 1968 providing *inter alia* that his newly-formed company, RWC Sales Corporation, would receive a three percent commission on all sales of Calnetics' units to Distributor. However, the exact sequence of events in the summer and fall of 1968 and the effect of the commission agreement are not so clearly established in the documents on file that a jury trial is unnecessary. Al-

[18] *See* Part I. D., *infra.*

though credible evidence suggests that the agreement was not consummated until fall, 1968, and not until *after* the Calnetics order was placed by Distributor, the evidence is far from conclusive. Christiansen and a Calnetics executive did in fact meet during the summer of 1968, and a reasonable inference, considering the signing of the actual agreement just a few months later, is that the commission agreement was hammered out during the summer.[19]

Further, a genuine fact issue exists as to the date on which Distributor made its decision to order Calnetics' units for the 1969 model year. If that decision was made prior to the consummation of the Christiansen agreement, a causal gap exists in defendants' facts. However, a jury might infer that the commission agreement and Distributor's decision to purchase Calnetics' products ripened together. And, even if initial 1969 orders were made prior to the Christiansen agreement, a jury might find that Calnetics maintained its position in the volatile air-conditioner market to Subsidiary's detriment because of the commission agreement.

Subsidiary's units, like those of the competing brands, were not completely satisfactory to Distributor, and Distributor may have dropped Subsidiary for purely independent business reasons. However, it is for the jury in a plenary trial, not the judge in a summary proceeding, to determine Distributor's motivation and the sequence of events leading up to Distributor's decision. For this reason, the counterclaim should not have been dismissed in its entirety. However, another ground does exist which compels partial dismissal.

An issue that may be renewed upon trial was raised by the summary judgment order against VW and Sub-

[19] *See* finding No. 14. 348 F.Supp. at 625.

sidiary. The court held that defendants' first counterclaim failed to state a claim for relief under §§ 1 and 2 of the Sherman Act. We agree. VW's and Subsidiary's claim of commercial bribery, standing alone, does not constitute a violation of the Sherman Act.[20] *Sterling Nelson & Sons, Inc.* v. *Rangen, Inc.*, 235 F.Supp. 393, 400 (D.Idaho 1964), *aff'd on other grounds*, 351 F.2d 851 (9th Cir. 1965), *cert. denied*, 383 U.S. 936, 86 S.Ct. 1067, 15 L.Ed.2d 853 (1966); *cf. United States* v. *Boston & Maine R.R.*, 380 U.S. 157, 162, 85 S.Ct. 868, 13 L.Ed.2d 728 (1965); *Norville* v. *Globe Oil & Refining Co.*, 303 F.2d 281, 282-83 (7th Cir. 1962). As the district court stated in *Sterling Nelson*:

> "The evidence here proves only bribery of an influential state employee which had a detrimental restraining effect upon interstate commerce. This is not the type of misconduct within the purview of the concepts of a combination in restraint of trade or monopoly as used in the Sherman Act * * *. [T]he Sherman Act must be interpreted in the light of well understood common law doctrines relating to monopolies and restraints of trade such as contracts for the restriction or suppression of competition in the market, agreements to fix prices, divide marketing territories, apportion customers, restrict production and the like. Nothing of that kind occurred here. This is a simple case of buying influence, sometimes called commercial bribery * * *." 235 F.Supp. at 400.

[20] This case does not present the question nor do we here decide under what circumstances a claim of commercial bribery tied to claims of other acts tending to restrain trade would state a cause of action under §§ 1 and 2 of the Sherman Act.

VW's and Subsidiary reliance on the Ninth Circuit opinion in *Sterling Nelson* for the proposition that antitrust claims may be based on commercial bribery is misplaced. This court decided merely that, according to congressional intent,[21] a claim under *§ 2(c) of the Clayton Act* could be based on commercial bribery. 351 F.2d at 858. The district court holding in *Sterling Nelson* that Sherman Act claims may not be predicated on commercial bribery was never presented to the Ninth Circuit for review, plaintiffs there having failed to cross-appeal from the dismissal of their Sherman Act claims.

The district court also based its summary dismissal of VW's counterclaims on the alternative ground that VW could not establish any damages flowing from the alleged Christiansen-Distributor commission agreement. That ruling is amply supported by the unequivocal testimony of VW's president, J. Stuart Perkins, that VW's expenses in distributing Subsidiary units would "eat up" any anticipated profit resulting from buying the units at one price and reselling them at a higher price. Because this testimony is undisputed and credible, and because VW has failed to point to any evidence tending to show that a genuine issue exists as to VW's damages, we affirm the summary judgment as to VW's counterclaims. However, a genuine issue of material fact remains as to the amount, if any, of Subsidiary's damages.

The summary judgment in favor of Calnetics on each of VW's counterclaims is affirmed for lack of proof of injury to VW. The summary judgment in favor of Calnetics on

[21] *See FTC v. Henry Broch & Co.*, 363 U.S. 166, 169-70 n.6, 80 S.Ct. 1158, 1161, 4 L.Ed.2d 1124, 1128 (1960), *citing* 80 Cong. Rec. 7759-60, 8111-12.

Subsidiary's counterclaim based on the Sherman Act is affirmed, but the summary judgment in favor of Calnetics on Subsidiary's other counterclaim is vacated and those claims are remanded for trial.

D. *Summary Judgment in Favor of VW and Subsidiary on the Sherman Act Claims.*

The district court granted summary judgment against Calnetics on its Sherman Act claims because Calnetics had entered into an illegal commission agreement with Christiansen which resulted in sales by Calnetics to Distributor in 1969. The court held that these sales were inadmissible for the purpose of proving damages. Without the use of the 1969 sales figures, Calnetics was unable to frame a damages study to show anticipated sales for 1970 and 1971.

The district court committed both a factual and a legal error in granting this partial summary judgment. As noted, a genuine issue of material fact exists as to the cause-and-effect relationship between the Christiansen commission agreement and Calnetics' sales to Distributor during the 1969 model year.[22] More important, the district court

[22] Defendants themselves concede that a genuine issue of fact exists as to causation. In arguing that the district court erred in entering summary judgment against them on their counterclaims, VW and Subsidiary note in their briefs that "[o]nly a jury can decide the relationship in time between Christiansen's expectation of a share in plaintiff's revenues from sales to * * * [Distributor] and * * * [Distributor's] decision to distribute plaintiff's units."

Further, the court's inconsistent causation findings in the summary judgment order in favor of VW and Subsidiary on the Sherman Act claims and in the summary judgment order in favor of Calnetics on the counterclaims suggests that the complexity of the evidence precludes use of summary procedures.

erred in ruling that because the 1969 sales resulted from an unlawful agreement they could not be admitted in evidence as a basis for calculating Calnetics' damages. Admissibility is one thing: weight and probative value another. The evidence may be weakened as to its value, but it is not categorically inadmissible.

Defendants' challenge to Calnetics' reliance on the 1969 sales figures is in effect an *in pari delicto* or "unclean hands" defense, which is not a defense in an action for treble damages. *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 140, 88 S.Ct. 1981, 1985, 20 L.Ed. 2d 982, 990 (1968); *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 71 S.Ct. 259, 95 L.Ed 219 (1951).

The *Perma Life* rule is firmly based on public policy grounds. As the Supreme Court stated:

> "* * * [T]purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws. The plaintiff who reaps the reward of treble damages may be no less morally reprehensible than the defendant, but the law encourages his suit to further the overriding public policy in favor of competition. A more fastidious regard for the relative moral worth of the parties would only result in seriously undermining the usefulness of the private action as a bulwark of antitrust enforcement. And permitting the plaintiff to recover a windfall gain does not encourage continued violations by those in his position since they remain fully subject to civil and criminal penalties for their own illegal conduct." 392 U.S. at 139, 88 S.Ct. at 1984, 20 L.Ed.2d at 990.

Contending that their defense is not one of *in pari delicto* or unclean hands, and is thus not barred by *Perma Life*, defendants argue that they are not challenging Calnetics' *right* to bring an antitrust action but merely its reliance on *illegal* sales for proof of damages. *See* E. Timberlake, Federal Treble Damage Antitrust Action § 21.10, at 326-28 (1965).[23] Labels, however, are not controlling,[24] and we find no legitimate reason for distinguishing defendants' "illegal sales" argument from the *in pari delicto* type of defense struck down in *Perma Life*.

From a practical point of view, Calnetics is in a position no different from that of the plaintiff in *Purex Corp.* v. *General Foods Corp.*, 318 F.Supp. 322 (C.D.Cal.1970), who had acquired an antitrust cause of action by virtue of an acquisition which was itself illegal. Recognizing the asserted defense of illegality as a species of *in pari delicto*, the *Purex* court rejected it. VW's and Subsidiary's defense is also strikingly similar to that rejected by the Tenth Circuit in *Semke* v. *Enid Automobile Dealers Ass'n*, 456 F.2d 1361 (10th Cir. 1972). In *Semke*, the plaintiff, an unlicensed

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[23] As stated by Timberlake:

> "This [refusal to consider ill-gotten gains as a basis of damages] is not a pari delicto defense, nor is it a defense that plaintiff was otherwise violating the antitrust laws * *. It is simply that profits made in the 'before' period, when plaintiff was the beneficiary of the unlawful acts, are not proper evidence upon which to predicate lost profits in the 'after' period." E. Timberlake, Federal Treble Damage Antitrust Action § 21.10, at 326.

However, Timberlake's argument should be read in light of the fact that his treatise was written three years before the Supreme Court's opinion in *Perma Life*. Further, *Victor Talking Machine Co. v. Kemeny*, 271 F. 810, 819 (3d Cir. 1921), upon which Timberlake primarily relies, was decided long before the trend against the use of the *in pari delicto* defense in antitrust suits took hold.

[24] *See Waldron v. British Petroleum Co., Ltd.*, 231 F.Supp. 72, 90-92 (S.D.N.Y. 1964).

dealer in new cars, brought suit against an automobile dealers' association for its interference with his business efforts. Citing *Perma Life*, the court refused to let defendant argue that plaintiff's whole business operation was illegal because he was in violation of state licensing statutes designed to protect the public from unscrupulous automobile dealers. The plaintiff, the court found, was entitled to prove damages his business suffered, even though at the time of injury plaintiff may have been illegally engaged in the automobile retail business. 456 F.2d at 1370. *See also Adolf Coors Co.* v. *A & S Wholesalers, Inc.*, 1975-1 CCH Trade Cases ¶ 60,187, at 65,626, 65,631 (D.Colo.1975).

Similarly, if Calnetics proves that defendants unlawfully foreclosed it from the Distributor market in 1970 and 1971, it is entitled to recover damages actually suffered even though the market position from which Calnetics was displaced had been attained only through illegal conduct. To rule otherwise would effectively frustrate the important public policy underlining the antitrust laws: encouragement of private antitrust suits in order to deter the illegal exercise of market power. *See Lanier Business Products* v. *Graymar Co.*, 355 F.Supp. 524, 526 (D.Md.1973). By allowing Calnetics to base its proof of damages on its 1969 sales, even assuming *arguendo* their illegality, we are not giving a green light to companies to violate the law against commercial bribery. As stated in *Perma Life*, antitrust violators "remain fully subject to civil and criminal penalties for their own illegal conduct." 392 U.S. at 139, 88 S.Ct. at 1984, 20 L.Ed.2d at 990. The fact that Calnetics is itself not immune from liability is underlined by Subsidiary's counterclaim for damages which, if sustained, will force Calnetics to disgorge any gains shown to be ill-gotten.

The summary judgments in favor of VW and Subsidiary on the Sherman Act claims are vacated.

II. Effect of Reversal of Summary Dispositions in Favor of VW, Subsidiary, and Distributor on the Clayton Act Judgment Awarding Equitable Relief.

In its complaint, Calnetics demanded a jury trial. VW, Subsidiary, and Distributor were entitled to rely on this demand, and were not obliged to make an independent demand with respect to the issues covered by Calnetics' demand in order to preserve their right to trial by jury under Fed.R.Civ.P. 38. *See* 5 J. Moore, Federal Practice ¶ 38,39[1], at 312; ¶ 38.45 (2d ed. 1948, *as amended* 1975).

Trial by jury of Calnetics' § 7 claim commenced on April 4, 1972, but was interrupted by a directed verdict on the issue of damages at the close of Calnetics' case. After granting the directed verdict the court dismissed the jury, over objections by VW and Subsidiary. The court then heard evidence on the remaining equitable claims, held that the acquisition of Subsidiary violated § 7 of the Clayton Act, and ordered divestiture.

Calnetics does not directly argue with VW's and Subsidiary's contention that, if the directed verdict and other summary dispositions in favor of VW and Subsidiary were erroneous, the defendants are entitled to a jury trial on remand of the entire § 7 claim, but a new trial makes it necessary to decide this point.

The Supreme Court held in *Ross* v. *Bernhard*, 396 U.S. 531, 90 S.Ct. 733, 24 L.Ed.2d 729 (1970), that "where equitable and legal claims are joined in the same action, there is a right to jury trial on the legal claims which must not be infringed either by trying the legal issues as incidential to the equitable ones or by a court trial of a common issue existing between the claims * * *." 396 U.S. at 537-38, 90 S.Ct. at 738, 24 L.Ed.2d at 736. Prior non-

jury trial of the equitable claims may infringe the right to jury trial on the legal claims because of the collateral estoppel or *res judicata* effect of a prior judicial determination of issues common to the two sets of claims. *Heyman* v. *Kline*, 456 F.2d 123, 130 (2d Cir.), *cert. denied*, 409 U.S. 847, 93 S.Ct. 53, 34 L.Ed.2d 88 (1972).

VW and Subsidiary are entitled to a jury determination of the Clayton Act claim for damages; this right may not be infringed by a prior judicial determination of the equitable claim. If the district court's determination that the acquisition violated § 7, made in the context of a nonjury trial of the equitable claims, were allowed to stand it would bind VW and Subsidiary in subsequent proceedings. Because the damages claim under § 7 remains outstanding as the result of our reversal of the § 7 directed verdict, the prior determination of a § 7 violation would infringe VW's and Subsidiary's right to a jury trial of the damages claim. Accordingly, the district court's judgment holding that the acquisition violated § 7 must be vacated.[25] The entire § 7 claim must be remanded for a jury trial. If, on remand, the jury determines that the acquisition did not violate § 7, that determination will preclude equitable relief.[26] If the jury determines that the acquisition did violate § 7, the trial judge must then go on to decide whether

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[25] Calnetics did not offer to waive the collateral estoppel effect of the § 7 equitable determination on remand. But even if it had, we would be inclined to remand for a consolidated trial because of the threat of inconsistent determinations. *See Heyman v. Kline*, 456 F.2d 123, 131 (2d Cir.), *cert. denied*, 409 U.S. 847, 93 S.Ct. 53, 34 L.Ed.2d 88 (1972).

[26] This is so because Calnetics' request for equitable relief, as well as its claim for damages, is based on the theory that the acquisition constituted a violation of § 7. Accordingly, the jury's resolution of the violation issue will control both sets of claims.

Calnetics is entitled to equitable relief under the standards of § 16 of the Clayton Act, 15 U.S.C. § 26.

III. VW's and Subsidiary's Arguments on the Merits of the § 7 Holding and Relief.

Our resolution of the jury-trial issue makes it unnecessary to deal either with VW's and Subsidiary's challenges to the merits of the district court's holding that the acquisition violated § 7 of the Clayton Act or with their challenges to the equitable relief granted by the district court. Nevertheless, in the interest of judicial economy, it is appropriate to comment briefly on challenged rulings that are likely to recur. On the other hand, our failure to discuss other issues raised by VW and Subsidiary does not indicate approval or disapproval of rulings made below.

A. *Definition of Product Market.*

In defining the product market, the district court explicitly refused to consider the cross-elasticity of production facilities or capacity. *Calnetics Corp. v. Volkswagen of America, Inc.*, 348 F.Supp. at 618. VW and Subsidiary argue that this refusal rendered the ensuing market definition—"air conditioners sold for use in the Volkswagen family of automobiles," clearly erroneous because not reflective of the sales opportunities of independent manufacturers of automobile air-conditioning equipment. VW and Subsidiary urge that such manufacturers may with little modification of production facilities produce units for different makes of cars.

The district court's failure to consider production cross-elasticity was inconsistent with the views of the Supreme Court[27] and of this circuit.[28] This is not to say that production cross-elasticity is the only factor which can be considered by the trier of fact in defining the product market.[29]

B. *Effect of the Acquisition.*

VW and Subsidiary argue that the trial court erred by relying exclusively on postacquisition changes in market shares in assessing the legality of the merger while omitting any economic analysis of its anticompetitive effect. Without accepting VW and Subsidiary's characterization of the district court's method, we agree that a more careful analysis was required.

The primary, though not exclusive, theory of Calnetics' § 7 attack on VW's acquisition of Subsidiary was vertical foreclosure. Foreclosure was threatened, Calnetics argued, not because VW itself was likely to satisfy its own demand from the output of the acquired firm but because VW's dealers and distributors were likely to satisfy their demand from such supply.

A threat of unlawful vertical foreclosure may exist when there is a vertical tie—such as common ownership of a customer and a supplier—for such a tie creates a danger that the normal competitive forces in the marketplace will

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[27] *See Brown Shoe Co., Inc. v. United States*, 370 U.S. 294, 325 n.42, 82 S.Ct. 1502, 1524, 8 L.Ed.2d 510, 535 (1962); *United States v. Columbia Steel Co.*, 334 U.S. 495, 510-11, 527, 68 S.Ct. 1107, 1115-16, 1124, 92 L.Ed. 1533, 1544-45, 1553-54 (1948).

[28] *Twin City Sportservice, Inc. v. Charles O. Finley & Co., Inc.*, 512 F.2d 1264, 1274 (9th Cir. 1975).

[29] *See, e. g., Heatransfer Corp. v. Volkswagenwerk, A.G.*, 1975-1 CCH Trade Cases ¶ 60,309 at 66,216, 66,219 (S.D.Texas 1975).

be displaced.[30] In a vertical merger the danger is that control over both a customer and a supplier will permit the controlling party to coerce the purchasing or selling policies of the captive firm, resulting in a " 'clog on competition' * * [citation omitted]," *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 324, 82 S.Ct. 1502, 1523, 8 L.Ed.2d 510, 535 (1962), or a "commanding position [for the controlling party] * * * not gained solely on competitive merit." *United States* v. *E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 605, 77 S.Ct. 872, 884, 1 L.Ed.2d 1057, 1074 (1957).

With respect to VW's wholly owned distributors, the existence of a vertical tie running from Subsidiary through VW to the distributors is clear enough. But it is not clear that VW control over the purchasing decisions of those distributors in which VW does not own a controlling interest can be properly inferred on the basis of the present record. The existence of the requisite control by VW over the purchasing decisions of Volkswagen dealers is even more doubtful in light of the district court's finding that "dealers [who buy air-conditioners from Distributor] are now, and always have been, free to purchase any type air-conditioner they desire from any source they desire."

We are confident that, on remand, the district court will properly instruct th. jury on issues relating to vertical foreclosure.

C. *Equitable Relief.*

In the event Calnetics obtains a jury verdict on its antitrust claims against VW and Subsidiary, the district court

[30] *See, e. g., Brown Shoe Co. v. United States*, 370 U.S. 294, 323-24, 82 S.Ct. 1502, 1522-23, 8 L.Ed.2d 510, 534-35 (1962); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 174, 68 S.Ct. 915, 937, 92 L.Ed. 1260, 1301 (1948); *United States v. Yellow Cab Co.*, 332 U.S. 218, 227-28, 67 S.Ct. 1560, 1565, 91 L.Ed. 2010, 2018 (1947).

will be required to evaluate Calnetics' right to equitable relief and, if the court deems relief appropriate, fashion a suitable decree.

In order to provide the district court with guidance in the event equitable issues arise, we turn to contentions made by VW and Subsidiary with respect to the equitable relief ordered by the district court in its supplemental order of January 19, 1973. *Calnetics Corp. v. Volkswagen of America, Inc.*, 353 F.Supp. 1219 (C.D.Cal.1973).

1. *Divestiture.*

The district court ordered the divestiture of Subsidiary. Under the law of this circuit, the remedy of divestiture is not available to private plaintiffs in antitrust suits. *International Telephone and Telegraph Corp. v. General Telephone & Electronics Corp.*, 518 F.2d 913, 920 (9th Cir. 1975).

2. *Threat of Loss or Damages Precondition to Equitable Relief under § 16.*

The district court held that, while Calnetics had not proved a causal connection between its loss of the Distributor market and the challenged merger, it was nonetheless entitled to equitable relief under § 16 of the Clayton Act because "a Section 7 *divestiture* plaintiff acts somewhat as a Rule 23 class representative and need not satisfy the requirement of 'impact' in its classical antitrust definition." *Calnetics Corp. v. Volkswagen of America, Inc.*, 348 F.Supp. at 620. (Emphasis added.) The court further stated that the proper focus was not on prospective injury to the particular plaintiff but rather on the "marketplace and the effects of the claimed anticompetitive acquisition upon the marketplace."

Because the remedy of divestiture is not available, the correctness of the district court's view that a private divestiture plaintiff need not satisfy the traditional requirement of "impact" is moot. The general rule, as stated by *United States* v. *Borden Co.*, 347 U.S. 514, 518, 74 S.Ct. 703, 706, 98 L.Ed. 903, 908 (1954), controls:

> "Under § 16 * * * a private plaintiff may obtain injunctive relief against * * * violations only on a showing of 'threatened loss or damage'; and this must be of a sort personal to the plaintiff * * * [citation omitted]."

In evaluating the plaintiff's entitlement to relief under § 16, the proper focus is on the threat of prospective injury to Calnetics. See *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130, 89 S.Ct. 1562, 1580, 23 L.Ed.2d 129, 152 (1969).[31]

3. *The Import Ban.*

The district court enjoined VW and its wholly owned distributors for a period of seven years from importing any Volkswagens, Porsches, or Audis equipped with air conditioning installed prior to importation.

VW and Subsidiary (as well as the Federal Republic of Germany) urge that this import ban offends Article 16 of the German/American Treaty of 1954,[32] and Articles I and

[31] *See also Rondeau* v. *Mosinee Paper Corp.*, 422 U.S. 49, 61-62, 95 S.Ct. 2069, 2077-78, 45 L.Ed.2d 12, 22-23 (1975).

[32] 7 U.S.T. 1839, 1857, T.I.A.S. No. 3593 (1956). The United States as amicus takes the view that the import ban does not offend the treaty or GATT.

III of the General Agreement on Tariffs and Trade (GATT),[33] because it restricts German manufacturers but not American automobile manufacturers, who remain free to sell cars with factory-installed air conditioners.

The district court was apparently of the view that the treaties had no application, *see Calnetics Corp.* v. *Volkswagen of America, Inc.*, 353 F.Supp. at 1222 n.5, because the relief granted did not "discriminate against the products of Germany in favor of United States producers or manufacturers." Rather, the relief granted was merely "intended to deal with and is aimed at the maintenance of a free, open and competitive market in automobile air conditioners for Volkswagen automobiles." 353 F.Supp. at 1222.

The district court apparently considered only the effect of its decree on competition within the submarket it had defined; on that basis, the decree did not "discriminate" against a German manufacturer, because the import ban was merely one of a series of restrictions aimed at controlling the purchasing and manufacturing activities of a domestic corporation, Volkswagen of America.

This reasoning is based upon an unduly limited market concept. The import ban affects not only competition for the sale of domestic automobile air conditioners but also competition for the sale of automobiles. The record demonstrates that an important factor in the sale of automobiles is the availability of integrated, factory-installed air conditioning. The ban discriminates against the German automobile manufacturer because it forbids him to sell in

[33] 61 Stat. Pt. 5, at A-5, A-12 through A-13, A-18 through A-19; T.I.A.S. No. 1700, 55-61 U.N.T.S. (1947).

the United States cars with factory-installed air conditioning while no similar restriction on domestic automobile manufacturers.

An exception in GATT does permit restrictive measures "necessary" to comply with United States antitrust laws.[34] But because the district court did not consider the treaties relevant, it did not attempt to justify the import ban under this exception.

Apart from treaty provisions, the effect of the import ban would be anticompetitive with respect to competition for the sale of automobiles. While courts must disregard such incidental effects in determining the illegality *vel non* of an alleged antitrust violation,[35] they should consider them when fashioning relief.[36]

Similarly, the ban will have at least a short-term anticompetitive effect with respect to competition for the sale of air conditioning equipment, because Volkswagenwerk A.G., the German manufacturer, will vanish as a potential market entrant, thus eliminating any downward price pressure the threat of its entry into the market might exert.

If, on remand, there is a jury verdict in favor of Calnetics on one or more of its antitrust claims against VW and Subsidiary, and if the district court makes the further determination that Calnetics is entitled to equitable relief under the traditional standards governing the availa-

[34] Article XX(I)(d) of GATT, 61 Stat. Pt. 5, at A-61.

[35] *Cf. United States v. Philadelphia National Bank*, 374 U.S. 321, 370-71, 83 S.Ct. 1715, 1745, 10 L.Ed.2d 915, 948-49 (1963).

[36] The relief granted must, of course, be effective to redress the violation and restore competition. *United States v. E. I. du Pont de Nemours & Co.*, 366 U.S. 316, 326, 81 S.Ct. 1243, 1250, 6 L.Ed.2d 318, 325 (1961).

bility of relief under § 16 of the Clayton Act, then the court should reassess the necessity for an import ban in light of (1) the applicability of the treaties, (2) the unavailability of the divestiture remedy, (3) the anticompetitive effect of the ban with respect to competition for the sale of automobiles, and (4) the anticompetitive effect of the ban with respect to competition for the sale of automobile air conditioners.

A special word is in order insofar as the district court may, on remand, contemplate reimposition of a ban on importation by VW of Porsche automobiles equipped with factory-installed air conditioning. Porsche was not a party to the proceedings below. It is an independent German corporation unrelated by ownership to any party in these proceedings. Its only connection to VW is that VW imports the Porsche product—a luxury sports car—into the United States. Elementary fairness requires that Porsche be given a chance to be heard before its importation agreement with VW is, in effect, partially voided by judicial decree.

4. *The Ban on Internal Expansion.*

VW and Subsidiary urge that the 10-year ban on domestic manufacture and assembly of automobile air conditioners which the district court placed on VW was unsupported by any factual conclusions or analysis.

Calnetics does not directly counter this argument in its responsive brief and reply.

The district court stated that the ban was necessary in light of the "near vacuum [of demand. presumably] created by the acquisition • • •." The ban was further justified as assisting in "the maintenance of a competitive mar-

ket" and "stabiliz[ing] competition • • •" in the aftermath of divestiture. 353 F.Supp. at 1221.

The ban on internal expansion was intended as a supplement to divestiture relief—presumably aimed "maintaining the divested company as a viable competitor in the marketplace without the aid of the protective practices of a parent who is its sole customer." 353 F.Supp. at 1221. Because divestiture is not an available remedy, there is scant basis for imposition of a ban on internal expansion on remand. The district court should, if the issue arises, reconsider the advisability of a ban on internal expansion in light of alternative injunctive remedies and the unavailability of divestiture.

5. *The Perpetual Purchase Restriction.*

The district court permanently enjoined VW and its wholly owned distributors from satisfying more than 50% of their air-conditioning equipment needs from the output of the divested firm. While the propriety of this particular quota is moot because of the unavailability of divestiture, we deal with the arguments relating to the 50% quota in order to guide the district court should it consider imposing a similar permanent quota on remand.

The United States virtually concedes in its *amicus* brief that the perpetual purchase restriction was error. Calnetics seeks to defend the restriction as necessary to insure that VW will not continue to buy all of its requirements from the purchaser of the divested firm. Calnetics argues that the 50% quota creates an open market for the competitors of the divested firm.

The 50% quota, however, creates the antithesis of an open market. As the district court inadvertently acknowledged, the effect of the quota is to displace the competitive forces of the marketplace and transform a segment of the automobile air-conditioning equipment business into a regulated industry. *See* 353 F.Supp. at 1223 ("The Court must therefore fashion some flexible standard by which the business needs of a buyer can be compatible with the needs of the various possible suppliers in this market.") It is inconceivable that such a quota would serve the goals of the antitrust laws. which are designed to preserve competition, not particular competitors.[37]

IV. Attorneys' Fees and Costs.

A. *Attorneys' Fees.*

The district court awarded Calnetics attorneys' fees because it had acted "in the role of 'private attorney general' • • •." 353 F.Supp. at 1225. Such an award is now precluded by *Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975).

B. *Costs.*

VW and Subsidiary argue that the district court erred in awarding the plaintiff $5,955.92 in costs for counsel's copies of depositions in contravention of a local rule of the district court which provided, with respect to deposition costs, that "[c]ounsel's copies are not taxable." Calnetics urges that the local rule was merely for the guidance of the Clerk of the Court and did not abrogate the district judge's inherent discretion. Calnetics' argument is foreclosed by *Rio Grande Irrigation and Colonization Co.* v. *Gildersleeve,* 174 U.S. 603. 608-09, 19 S.Ct. 761, 763, 43 L.Ed. 1103, 1105 (1899) (" 'A rule of the court thus authorized and made has the force of law, and is binding upon the court as well as upon parties to an action and cannot be dispensed with to suit the circumstances of any particular case • • •, • • •,' " *quoting Thompson* v. *Hatch,* 3

[37] *Brown Shoe Co. v. United States,* 370 U.S. 294, 320, 82 S.Ct. 1502, 1521, 8 L.Ed.2d 510, 532 (1962).

Pick. 512, 515, 20 Mass. 512 (1827); *accord, Weil* v. *Neary,* 278 U.S. 160, 169, 49 S.Ct. 144, 148, 73 L.Ed. 243, 248 (1929).

Calnetics relies on *Independent Iron Works, Inc.* v. *United States Steel Corp.,* 322 F.2d 656, 678 (9th Cir. 1963), which held that a "trial judge [has] the power to tax the expense of • • • depositions • • [because] such power is 'implicit in 28 U.S. C.A. § 1920(2)' • • •." *Independent Iron Works* is inapposite because the cost award there did not contravene a local rule.

The award of costs for counsel's copies of depositions was error.

V. Distributor's Proposed Counterclaim Under 15 U.S.C. § 13(c).

Distributor appeals from an order of the district court denying in part a motion to amend its answer. Distributor sought to add three counterclaims. The first counterclaim was against Calnetics for breach of warranty. The second and third counterclaims were brought against Calnetics, certain officers and directors of Calnetics, and certain employees of Distributor. (Both the second and third counterclaims involve identical parties.) Additionally, both the second and third counterclaims are based on the same allegations of fact: that Calnetics paid substantial sums of money to certain Distributor employees to induce them to use their positions to see to it that Distributor purchased all, or substantially all, of its air-conditioner requirements from Calnetics.

The second and third counterclaims differ as to the nature of the damages caused, the remedy sought, and the theory of liability. The second counterclaim alleges commercial bribery in violation of § 2(c) of the Robinson-Patman Act, 15 U.S.C. § 13(c). The second counterclaim alleges that this commercial bribery caused Distributor to continue to deal with plaintiff despite the inferior nature of plaintiff's product, and that this caused Distributor to suffer damages in excess of $150,000, in lost sales due to customer dissatisfaction, damages to its good will and reputation, and costs in having to repair and remedy the defective products. The third counterclaim is based on state statutory prohibitions against inducing the breach of a fiduciary relationship. The third counterclaim seeks to recover the secret profits (*i.e.,* the bribes) paid to Distributor's employees, and exemplary damages.

The district court granted Distributor's motion to amend in part, allowing the addition of the first and third counterclaims, but denying the addition of the second. The district court's order does not explain its reasons for refusing to allow the addition of the second counterclaim.

Calnetics suggests several procedural reasons: the proposed amendment was tardy, would have caused undue confusion of the issues, would have caused undue delay. But these hindsight rationalizations are not convincing in light of the district court's granting the motion to add two other counterclaims by Distributor, one of which (the third) would have posed the identical procedural problems.

We suspect that Calnetics approaches the district court's actual reason for denying Distributor's motion to add the second counterclaim when it argues in its brief:

> "As the District Court pointed out to • • • [Distributor's] counsel at the hearing on the motion for leave to amend, the proposed second count (Robinson-Patman claims) failed to state a claim for recoverable damages. In its antitrust claim, • • • [Distributor] did not assert the kind of injury which has been recognized and for which damages have been

> recovered in 'commercial bribery' cases under Section 2(c) of the Robinson-Patman Act. * * * [Distributor] did not claim that it had been overcharged and paid excessive prices for plaintiff's products by reason of the alleged secret payments, as was the case in *Fitch* v. *Kentucky-Tennessee Light & Power Co.*, 136 F.2d 12 (6th Cir. 1943) * * *. And * * * [Distributor] did not and, of course, could not claim that it was precluded by a competitor from the market (in this case, itself) because of commercial bribery, as was the case in *Rangen, Inc.* v. *Sterling Nelson & Sons, Inc.*, 351 F.2d 851 (9th Cir. 1965) [*cert. denied*, 383 U.S. 936, 86 S.Ct. 1067, 15 L.Ed.2d 853 (1966)]."

If this is in fact the reason why the district court refused to allow the amendment (and we think it is), we believe that both the court below and Calnetics have taken too narrow a reading of the *Rangen* and *Fitch* cases as to the relief available under § 2(c).

Both *Fitch*, 136 F.2d at 15, and *Rangen*, 351 F.2d at 856-58, have held that § 2(c)'s application is not limited to situations of price discrimination, but also encompasses commercial bribery. In *Rangen* this court held:

> "With regard to the legislative history, defendant's cite excerpts which amply demonstrate that, in enacting section 2(c), the prime concern of Congress was to curtail price discriminations accomplished by pseudo-brokerage arrangements. The Supreme Court, in *Federal Trade Comm'n* v. *Henry Broch & Co.*, 363 U.S. 166, 169, 88 S.Ct. 1158, 4 L.Ed. 2d 1124, noted this principal legislative concern. But, in a footnote (page 169), the Court also expressed

> the view that the legislative history demonstrates a Congressional intent to proscribe other practices such as the bribing of a seller's broker by the buyer * * * [footnote omitted].
>
> "This view is further borne out by the statement in the House Report, quoted below, indicating that Congress was concerned with preserving the fiduciary relationship between a broker and his client * * * [footnote omitted].
>
> " * * *
>
> " * * * In our case the bribery not only undermined a fiduciary relationship which Congress sought to protect, but gave one seller a grossly unfair advantage over a competing seller. Where commercial bribery is associated with evils which a particular provision of the antitrust laws was designed to prevent, the fact that it was bribery rather than a more defensible arrangement ought not to preclude application of the statute." 351 F.2d at 856-57.

The alleged violations in the instant case no less involve the undermining of fiduciary relationships than did those in *Fitch* or *Rangen*. We hold that, if distributor is able on remand to prove that counterdefendants indeed committed acts of commercial bribery in violation of § 2(c), then the defendants ought to be allowed any damages proximately caused by that violation.

The district court erred in denying Distributor's motion to amend its answer to add the second counterclaim.

VI. Conclusion

The claims and counterclaims discussed above are remanded for further proceedings consistent with the views expressed herein.

APPENDIX H

Order

Filed May 17, 1976

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Nos. 73-1954, 73-1953, 73-1955 to 73-1958

CALNETICS CORPORATION, and MEIER-LINE, INC.,

Appellants,

v.

VOLKSWAGEN OF AMERICA, INC., *et al.*,

Appellees.

CALNETICS CORPORATION,

Appellee,

v.

VOLKSWAGEN OF AMERICA, INC., *et al.*,

Appellant (five cases)

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Before:

BARNES, CHOY, and GOODWIN, *Circuit Judges.*

The court has considered the Petition for Rehearing and Other Relief filed March 30, 1976, by Volkswagen of America and Volkswagen Products Corp., and the response filed May 4, 1976, by Calnetics Corporation and Meier-Line, Inc.

The petition for rehearing is denied; the mandate will issue forthwith.

APPENDIX I

Excerpts from Volkswagen of America, Inc.'s and Volkswagen Products Corporation's Counterclaim for Damages Under the Anti-Trust Laws, Unfair Competition and Interference with Business Relations

IN THE

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. 70-2185-R

Filed: June 15, 1971

CALNETICS CORPORATION,

Plaintiff,

against

VOLKSWAGEN OF AMERICA, INC., VOLKSWAGEN PACIFIC, INC. and VOLKSWAGEN PRODUCTS, INC.,

Defendants.

R.W.C. SALES CORPORATION, ROLF W. CHRISTENSEN and PHILIP BALLINGAL,

Additional Defendants on Counterclaim.

COUNTERCLAIM FOR DAMAGES UNDER THE ANTI-TRUST LAWS, UNFAIR COMPETITION AND INTERFERENCE WITH BUSINESS RELATIONS (Jury Trial Demanded)

VOLKSWAGEN OF AMERICA, a New Jersey corporation (hereinafter "VWA") and VOLKSWAGEN PRODUCTS COR-

Excerpts from Volkswagen of America, Inc.'s and Volkswagen Products Corporation's Counterclaim for Damages Under the Anti-Trust Laws, Unfair Competition and Interference with Business Relations

PORATION, a Texas corporation (hereinafter "VPC"), (hereinafter sometimes jointly referred to as "cross-claimants"), complain of the above named Counter-Claim Defendants (hereinafter jointly referred to as "cross-defendants") and each of them as follows:

III

NATURE OF TRADE AND COMMERCE

9. Volkswagen and Porsche automobiles are not sold with factory installed air conditioning systems as standard equipment. Distributors, such as VPI, purchase air conditioning systems from manufacturers and distributors of air conditioning systems, including but not limited to VWA, and install them in automobiles which are then sold to dealers. In some instances dealers purchase air conditioning systems directly from manufacturers or distributors of air conditioning systems and install them in automobiles as their customers require. At all times relevant hereto, VWA sold to dealers and distributors air conditioning systems manufactured by VWP. At all times relevant hereto cross-claimants and CALNETICS competed in the distribution and sale of air conditioning systems to VPI and to dealers in Volkwagen and Porsche automobiles in the Southern California, Arizona, Southern Nevada and Hawaii areas.

Excerpts from Volkswagen of America, Inc.'s and Volkswagen Products Corporation's Counterclaim for Damages Under the Anti-Trust Laws, Unfair Competition and Interference with Business Relations

10. Air conditioning systems distributed and sold by cross-claimants and CALNETICS are manufactured from various materials shipped to each party from various sources of supply throughout the United States by means of interstate transportation. These air conditioning systems are shipped by means of interstate carriers to purchasers in the aforesaid areas. During the period covered by this cross-claim, there was a continuous and uninterrupted flow of the air conditioning systems manufactured by VWP in interstate commerce which was directly, substantially and adversely affected by the restraints and illegal acts hereinafter alleged.

IV

OFFENSES CHARGED

11. Beginning some time in or about 1968, the exact date being presently unknown to cross-claimants, and continuing through and including the year 1970, cross-defendants and other co-conspirators presently unknown to cross-claimants, contracted, combined and conspired between and among themselves to restrain interstate trade and commerce and attempted to monopolize interstate trade and commerce in the distribution and sale of air conditioning systems for Volkswagen and Porsche automobiles in Southern California, Arizona, Southern Nevada and Hawaii, in violation of Sections 1 and 2 of the Sherman Act.

Excerpts from Volkswagen of America, Inc.'s and Volkswagen Products Corporation's Counterclaim for Damages Under the Anti-Trust Laws, Unfair Competition and Interference with Business Relations

12. In furtherance of said contracts, combination and conspiracy, cross-defendants and each of them, together with co-conspirators presently unknown to cross-claimants, entered into a plan and program to interfere with, impair and eliminate cross-claimants as competitors in the aforesaid interstate trade and commerce in Southern California, Arizona, Southern Nevada and Hawaii and to attempt to monopolize said interstate trade and commerce in said areas. More particularly cross-defendants and each of them together with co-conspirators presently unknown to cross-claimants performed numerous acts to prevent and foreclose cross-claimants from selling air conditioning systems to VPI and dealers in Volkswagen and Porsche automobiles in Southern California, Arizona, Southern Nevada and Hawaii, including the following:

(a) R.W.C. SALES, CHRISTENSEN and BALLINGAL entered into a contract with CALNETICS, whereby CHRISTENSEN and BALLINGAL agreed, during the period of their employment by VPI, to cause VPI to purchase all or substantially all of its air conditioning system requirements from CALNETICS to the exclusion of all other manufacturers and distributors of such air conditioning systems, including cross-claimants.

(b) CALNETICS bribed CHRISTENSEN, BALLINGAL and other employees of VPI, whose names are presently unknown to cross-claimants, to use their position at VPI to induce VPI and VPI dealers to purchase all or substantially all of their air conditioning system requirements

Excerpts from Volkswagen of America, Inc.'s and Volkswagen Products Corporation's Counterclaim for Damages Under the Anti-Trust Laws, Unfair Competition and Interference with Business Relations

from CALNETICS to the exclusion of all other manufacturers and distributors of such air conditioning systems, including cross-claimants.

(c) Cross-defendants caused the dissemination of false and misleadng information regarding the relative merits of the air conditioning systems manufactured by CALNETICS and those manufactured by VWP to induce VPI and VPI dealers not to purchase VWP's air conditioning systems from VWP or VWA.

(d) Cross-defendants induced VPI and VPI dealers to promote the sale of CALNETICS' air conditioning systems without regard to their merits and induced VPI to purchase and become an exclusive distributor of such air conditioning systems to the exclusion of all other air conditioning systems, including those manufactured by VWP, when in fact CALNETICS' products were defective and could not fairly compete on their merits with cross-claimant's air conditioning systems.

V

EFFECTS OF THE VIOLATIONS ALLEGED

13. As a result of the aforesaid unlawful contracts, combination and conspiracy, the businesses of cross-claimants in the distribution and sale of air conditioning systems for Volkswagen and Porsche automobiles in Southern California, Arizona, Southern Nevada and Hawaii have been damaged seriously in that:

Excerpts from Volkswagen of America, Inc.'s and Volkswagen Products Corporation's Counterclaim for Damages Under the Anti-Trust Laws, Unfair Competition and Interference with Business Relations

(a) They have lost sales to then existing old accounts to whom they had sold air conditioning systems prior to the unlawful acts and to whom sales would have continued to be made but for such unlawful acts and conduct;

(b) They have lost sales to new accounts to whom they would have made sales but for such unlawful acts and conduct;

(c) They have suffered substantial injury to their goodwill and reputation as a result of said unlwful acts and conduct.

14. As a proximate result of the aforementioned unlawful acts and conduct, VWP has suffered damages considerably in excess of $100,000.00, and VWA has suffered damages in excess of $50,000.00. Cross-claimants will seek leave to amend this cross-claim to set forth their damges more precisely when they have been ascertained.

Service of the within and receipt of a copy thereof is hereby admitted this ..... day of October, A.D. 1976.

Supreme Court, U. S.
FILED
OCT 14 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1976
No. 76-379

VOLKSWAGEN OF AMERICA, INC. and VOLKSWAGEN PRODUCTS CORP.,

Petitioners,

vs.

CALNETICS CORPORATION, MEIER-LINE, INC., R. W. C. SALES CORPORATION, ROLF W. CHRISTIANSEN, WILLIAM R. SACHKO, PHILLIP BALLINGALL, D. C. HARDING, D. N. EMANUEL, R. S. BELLER and F. E. EDWARD,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION.

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IN THE

Supreme Court of the United States

October Term, 1976
No. 76-379

VOLKSWAGEN OF AMERICA, INC. and VOLKSWAGEN PRODUCTS CORP.,

Petitioners,

vs.

CALNETICS CORPORATION, MEIER-LINE, INC., R. W. C. SALES CORPORATION, ROLF W. CHRISTIANSEN, WILLIAM R. SACHKO, PHILLIP BALLINGALL, D. C. HARDING, D. N. EMANUEL, R. S. BELLER and F. E. EDWARD,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION.

This brief is submitted by respondents Calnetics Corporation and Meier-Line, Inc. (hereinafter collectively "Calnetics"), in opposition to the Petition for a Writ of Certiorari filed herein by petitioners Volkswagen of America, Inc. ("VW" or "VWoA"), and Volkswagen Products Corp. ("VPC").

Questions Presented.

Respondents submit that petitioners' Statement of Questions Presented is misleading because it is qualified with assertions of disputed or unproved facts and with

characterizations of the rulings below which do not accurately reflect the actual rulings. When such matters are excised from the questions, the legal issues presented by the Petition are:

I. Did the court below err in upholding summary judgment against counterclaims asserted under the Sherman Act where the *only* wrong alleged was the payment of commissions or rebates by the counterdefendant, Calnetics, to an agent of one of its customers?

II. Did the court below err in upholding summary judgment against one of the counterplaintiffs, VW, on the additional ground that it suffered no injury, where uncontradicted testimony of the party itself established that it suffered no compensable damage from the alleged commercial bribery?

III. Did the court below err in rejecting, on the ground that it was merely a species of the discredited *in pari delicto* defense, the contention that Calnetics' actual sales figures could not be used in its Sherman Act claims as a basis for calculating its damages because the sales allegedly reflected a separate commercial wrong of Calnetics?

IV. Did the court below err in holding that Calnetics' damage claim, under Section 7 of the Clayton Act, was not subject to summary disposition where the challenged acquisition was clearly followed by a loss of business to Calnetics, but the cause thereof was disputed, Calnetics asserting that it was the acquisition and subsequent anticompetitive conduct and defendants arguing that it was the cessation of a commission arrangement between Calnetics and an agent of one of its customers?

Statement of the Case.

The rulings challenged by the Petition arise from a private antitrust action filed by respondent Calnetics, a manufacturer of air conditioners designed for Volkswagen cars,[1] on September 28, 1970, in which VW and VPC, defendants therein, asserted antitrust and pendent counterclaims. Their defense to the suit, their counterclaims and the present Petition to this Court, all revolve around a charge that for about a one-year period, beginning in October 1968, Calnetics illegally paid commissions to a company owned in substantial part by an employee of defendant Volkswagen Pacific, Inc. ("VPI"), which was an independent distributor of Volkswagens and, at the time, a customer of Calnetics.

Respondents believe that petitioners have skewed their portrayal of this charge by treating some of their major allegations as though they were established fact, and by omitting even a mention of numerous salient facts on which the challenged rulings were based. Therefore, respondents submit the following statement of additional facts:

A. Basic Facts.

For several years prior to 1968, VPI purchased virtually all air-conditioning units for its cars from VW, the exclusive national importer of Volkswagen automobiles, which bought the units for resale from Delanair Engineering Company ("Delanair").

The Delanair units were so constantly defective and of such poor quality that VPI's management was forced

---

[1]As used herein, the term Volkswagen refers to automobiles marketed under the Volkswagen, Porsche and Karmann Ghia brand names.

to search for alternative suppliers [Tr. 2058, 1059]. As early as 1965, VPI was encouraging Calnetics' predecessor to develop a more suitable air-conditioning system for Volkswagens [Tr. 770-73]. Calnetics' predecessor continued development of such a system with technological assistance from VPI, and in 1967 Calnetics began installing prototype units in Volkswagens, including some VPI field representative cars.

In the midsummer of 1968, VPI decided to discontinue the Delanair line and in September of that year announced that it would distribute Calnetics' "Meier-Line" systems to its dealers [Tr. 663]. This announcement was thus made substantially *prior* to the time, October 1968, when petitioners say that Calnetics entered into an agreement to pay a company owned primarily by Rolf Christiansen, VPI's service manager, commissions on sales to VPI and others (Pet. 2).

Moreover, VPI was not the only Volkswagen distributor which turned from the defect-ridden Delanair units distributed by VW to competitive units. In fact, nearly all distributors, with the exception of VW's wholly-owned subsidiaries, started purchasing competitive brands, including DPD (or "Delta") and Heatransfer [R. 1504-06]. Even VW's service manager admitted that the Meier-Line air conditioners were superior to the Delanair units, stating, "There is no question that . . . the unit, (Meier-Line) is, no doubt, superior to the presently marketed Delanair unit." [R. 1478, 1481].

Indeed, while the sale of Delanair units was "not a profitable item" in the first place because the expense of distributing them "would 'eat up' any anticipated profit" from marking them up on resale (532 F.2d 674, 688 (9th Cir. 1976)), VW incurred extraordinary and ever-increasing technical and service expenses on

these units in 1968 and 1969. In June of 1968, a VW liaison engineer had to be permanently stationed at Delanair's facility in Texas in order to cope with ever-mounting technical problems, and by January 1969, VW was forced to assume generally the service responsibilities for the Delanair units [R. 1497].

The inroads made by Calnetics and its competitors, DPD and Heatransfer, by negotiations with individual distributors acting independently, including a 10,000-unit purchase order from VPI to Calnetics [R. 1477], were what VW and Delanair feared and sought to prevent [R. 1486, 1490, 1492]. Their earlier monopolistic position of 85% had fallen to only 50%—a figure obviously not acceptable [R. 1521]. VW had already commenced a program of threatening the disallowance of warranty on Volkswagens equipped with Meier-Line units [R. 1477]. It had already taken over the service responsibilities for Delanair [R. 1497]. Yet, the prospect of Delanair regaining its earlier markets on the merits was not promising. VPI's parts manager (a person not connected at all with the alleged Christiansen "bribe"), for one, told a Delanair representative that he had no present intention of renewing dealings with Delanair, and that if Meier-Line should fail them, they would probably take a look at DPD [R. 1500-01]. Something had to be done.

On September 26, 1969, VW acquired Delanair [R. 1499]. The "deep pocket" of VW was now injected into a market composed of relatively small, struggling entrepreneurs. VW infused Delanair with a $575,000 interest-free loan [Tr. 792]. The acquired company's line of credit was guaranteed by its enormously wealthy parent [Tr. 789-93, 871, Ex. 414]. An entire management team was transferred from VW to Delanair, and

a strong technical field force was added [Tr. 751, 779, 871-72]. Delanair's "bad name" was replaced with the family name Volkwagen Products Corp. ("VPC") [Tr. 787-88, 967, Ex. 240]. A massive, nationwide, advertising campaign promoting the concept that "Volkswagen is now in the air-conditioning business" commenced, and intensive sales meetings with distributors were conducted by an entourage of both VW and VPC officials [Ex. 567]. In addition, these exertions of deep pocket muscle were accompanied by a program to disparage Meier-Line, which included statements that Meier-Line's product was inferior and that it did not honor warranties [R. 1515].

Even prior to the acquisition, VW had made known to Volkswagen distributors its exclusionary philosophy that only one brand of air conditioners should be available to the Volkswagen organization [Ex. 410], and it clearly viewed the purchase of Delanair as "an important step" in implementing this exclusionary ideal [Ex. 235]. On the very day of the acquisition, VW began to solicit its distributors' "fullest support of this new endeavor" [Ex. 231; R. 1499].

The effects of the cumulative pressures flowing from the acquisition were not lost on VW's distributors and dealers, who were downstream on a distribution chain controlled by VW and committed by franchise agreements to use their "best efforts to promote the sale of VW parts" [Exs. 370, 370A, 370B]. As VPC's competitors discovered, the attitude of dealers and distributors was that "as long as it is in a VWoA box, I will buy it" [Tr. 967]. They just did not want the "aggravation and hassle" that VW could give them for buying a non-Volkswagen product [Tr. 1194]. ". . . [T]hey had their own company and really wasn't [sic]

interested" in dealing with outside suppliers [Tr. 934]. Thus, even though VPI's President told VW after the acquisition that he was "satisfied" with his present suppliers, which included Calnetics [Tr. 877-88, 885], VPI came around, promised VW and VPC that it would "join" their "marketing efforts," cancelled its 10,000-unit order with Calnetics, replaced it with a 1,500-unit order, eventually cancelled that, and finally went with VPC "one hundred percent" [R. 787, 1511, 1512, 1515].

It took about a year of constant changes before VW felt VPC was "back on the right track" and could fulfill all the Volkswagen distributors' requirements [Tr. 764-66]. But once it was, VW's single supplier philosophy was realized; with VPC, VW had effectively foreclosed once growing competitors from the market while itself leap-frogging to a virtual monopolist's control of 71% of the air-conditioner sales for its Volkswagen automobiles. 348 F.Supp. 606, 613, 620-21 (C.D. Cal. 1972), referencing the proven market shares.

B. Proceedings Below.

In September 1970, Calnetics brought suit for damages and equitable relief against VW, VPC and VPI, charging them with conspiring to restrain and monopolize trade and commerce in the manufacture, distribution and sale of air conditioners designed for Volkswagen automobiles, in violation of Sections 1 and 2 of the Sherman Act, and charging VW with acquiring Delanair (VPC) in violation of Section 7 of the Clayton Act. VW and VPC entered counterclaims on the theory that Calnetics' commission arrangement with Christiansen violated Sections 1 and 2 of the Sherman Act, Section 2(c) of the Robinson-Patman Act and state tort laws.

All claims, except Calnetics' Section 7 claims for equitable relief, were disposed of, adversely to the respective complainants, by summary procedures. Based on trial of the facts set forth above, together with statistical evidence of VPC's vault to domination, the court held the acquisition illegal under Section 7 and ordered divestiture and other equitable relief. 348 F. Supp. 606 (C.D. Cal. 1972); 353 F.Supp. 1219 (C.D. Cal. 1973).

On appeal, the Ninth Circuit affirmed the summary judgment against VW's and VPC's Sherman Act claims on two grounds: (1) their claim of commercial bribery, standing alone, did not constitute a violation of the Sherman Act (532 F.2d at 687); and (2) VW could not establish any damages flowing from the alleged commission agreement. *Id.* at 688.

The Ninth Circuit reversed the grant of summary judgment against Calnetics' Sherman Act claims. First, it said, the district court overlooked a genuine issue of fact whether the alleged commission agreement was at all causally connected to Calnetics' sales to VPI, as VW and VPC themselves conceded in their briefs (*id.* at 688 n. 22). Second, it found that the lower court's absolute bar on the use of "illegal sales" to prove damages granted credence to a discredited *in pari delicto* or "unclean hands" defense. *Id.* at 688-89. The circuit court rejected the defense with the knowledge that, if its hands were dirty, Calnetics would be separately liable for its own misconduct. *Id.* 689.

The Ninth Circuit also reversed the directed verdict against Calnetics' Section 7 damage claim. It observed that the district court did not clearly indicate the facts on which it based its lack-of-causation finding and that, based on the evidence presented, there was a genuine issue on causation. *Id.* at 684-86.

REASONS THE WRIT SHOULD NOT BE GRANTED.

Petitioners' argument for this Court's review of their case is couched in terms of the evils of "commercial bribery" and the horrors of allowing bad men to recover for wrongs done them. Structured in this way, their argument almost systematically ignores the facts that: (a) there are legal proscriptions on commercial bribery and channels for vindicating losses occasioned by it, including the federal Robinson-Patman Section 2(c) and state tort laws; (b) there has been no adjudication that the respondents herein have harmed the petitioners or their businesses; and (c) as the Ninth Circuit recognized, "Calnetics is itself not immune from liability," and neither should petitioners be.

Atmospheric coloration aside, the specific issues raised by the Petition do not warrant review by this Court on certiorari because, properly drawn, each was correctly decided by the Ninth Circuit *on the basis of the facts* developed in the case, in accordance with prevailing principles of law previously articulated by this Court and others, and without conflict with the rules enforced in other circuits.

I

The Ninth Circuit's Ruling That VW's and VPC's Charges of Commercial Bribery Were Not Cognizable Under the Sherman Act Was Soundly Based on Well-Established Precepts of the Scope of the Sherman Act.

The Ninth Circuit did not uphold summary judgment against VW's and VPC's Sherman Act claims *because* they were "based on conduct motivated by commercial bribery" (Pet. 16) but because they constituted nothing

more than a claim of commercial bribery, specifically a claim that a single seller granted a commission to the agent of a single buyer. 532 F.2d 674. Nor did the court hold, or even imply, that commercial bribery and the Sherman Act are "mutually exclusive" (Pet. 17), or that, "[i]f a restraint of trade or attempted monopolization incorporates commercial bribery, it lies outside the Sherman Act." (Pet. 19). To the contrary, the Ninth Circuit specifically noted that:

> "This case does not present the question, nor do we here decide, under what circumstances a claim of commercial bribery tied to claims of other acts tending to restrain trade would state a cause of action under §§ 1 and 2 of the Sherman Act." 532 F.2d at 687 n. 20.

It is only by ignoring this limitation that petitioners are able to make the exaggerated mischaracterizations quoted above. By the same token, it is only by ignoring this limitation that petitioners are able to construct an artificial conflict with other circuits which have studied claims involving aggregations of numerous unfair business practices, undertaken on a concerted basis by competitors, for possible Sherman Act violations. *E.g., George R. Whiten, Jr. Inc. v. Paddock Pool Builders, Inc.*, 508 F.2d 547 (1st Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975). Indeed, not one of the purportedly conflicting decisions cited by the petitioners (Pet. 19) was based on a *solitary* claim of "commercial bribery."

As petitioners' own discussion of their allegations discloses (Pet. 17), their case, unlike those they cite

for support, clearly did present only a solitary claim of commercial bribery yoked to conventional antitrust language with the *ipse dixit* that the one equals the other. In ruling that this alleged "commercial bribery, standing alone, does not constitute a violation of the Sherman Act" (532 F.2d at 687), the court was applying well-established and well-reasoned precepts of the proper ambit of the Sherman Act. The very case which VW and VPC invoked to support their bribery claim under Section 2(c) of the Robinson-Patman Act articulately enunciated these principles, within the framework of prior federal decisions:

> "The evidence here proves only bribery of an influential state employee which had a detrimental restraining effect upon interstate commerce. ***This is not the type of misconduct within the purview of the concepts of a combination in restraint of trade or monopoly as used in the Sherman Act.*** This case falls within the principles found controlling in *Parmelee Transportation Company v. Keeshin*, (7 CCA 1961), 292 F.2d 794, where the Court said, 'However, *the use of conventional antitrust language in drafting a complaint will not extend the reach of the Sherman Act to wrongs not germane to that act*, even though such wrongs be actionable, under state law.' That Court quoted extensively from *Apex Hosiery Co. v. Leader*, 1940 (1940-1943 Trade Cases ¶56,039), 310 U.S. 469, in which the Supreme Court announced that *the Sherman Act must be interpreted in the light of well understood common law doctrines relating to monopolies and restraints of trade. . . . Nothing of that kind occurred here. This is a simple case*

> *of buying influence, sometimes called commercial bribery,* which is cognizable under the antitrust laws only because of the specific language of 15 U.S.C. 13(c) and the judicial applications of the section we have noted. The case falls short of proving actionable wrongs under the Sherman Act. Cf. *Norville v. Globe Oil & Refining Co.,* (7 CAA 1962), 303 F.2d 281." *Sterling Nelson & Sons, Inc. v. Rangen, Inc.,* 235 F.Supp. 393, 399-400 (D. Idaho 1964), *aff'd on other grounds,* 351 F.2d 851 (9th Cir. 1965), *cert. denied,* 383 U.S. 936 (1966) (emphasis added), quoted in part 532 F.2d at 687.

This Court has similarly recognized that the Sherman Act is not a panacea for every commercial wrong, and especially not for a single actor's attempt to purchase the influence of another. As the Court observed with respect to such allegations in *United States v. Boston & Maine Railroad,* 380 U.S. 157, 162 (1965):

> ". . . it is doubtful that this indictment, as illuminated by the bill of particulars, alleges anything more in substance than a bribe. Bribery might well be in the family of offenses covered by a conflict of interest statute. But it is more remote from an antitrust frame of reference."

To say, in this fashion, that bribery standing alone does not state a Sherman Act claim is not to approve of bribery, but to place it rationally in the appropriate family of wrongs. This the Ninth Circuit has done, for it recognized, *inter alia,* the propriety of petitioners' claim under the Robinson-Patman family of pricing violations. 532 F.2d at 679.

II

Summary Judgment Was Properly Entered Against VW on the Basis of Uncontradicted Testimony That It Could Demonstrate Any Damages Resulting From the Alleged Commercial Bribery.

VW's challenge to the second ground for affirmance of summary judgment against it, that it "could not establish any damages flowing from the alleged Christiansen-Distributor commission agreement" (523 F.2d at 688), is a belated attempt to circumvent its failure to contradict, or even present evidence on, the undisputed facts on which that finding was based.

As VW knows from the cases it cites, "In awarding damages for loss of profits, net profits and not gross profits are the proper measure of recovery." *Distillers Distributing Corp. v. J. C. Millett,* 310 F.2d 162, 164 (9th Cir. 1962) (cited in Pet. 21). As VW also knows, the record below contained uncontradicted testimony that "in reselling Delanair units VW made no net profit" (Pet. 21) and that really it suffered no compensable damages at all by virtue of VPI purchases from Calnetics in 1968 and 1969, when the commission agreement was in effect. 532 F.2d at 688.

VW's President testified on several occasions that the distribution of air conditioners was not a profitable business and, as the Ninth Circuit noted, "that VW's expenses in distributing Subsidiary units would 'eat up' any anticipated profits resulting from buying them at one price and reselling them at a higher price." *Id.*

VW has never made any effort to present any *evidence,* credible or otherwise, contradicting either this testimony or any of the other evidence of rapidly

escalating technical and service assistance costs. Instead, it presented both courts below and now this Court, with a lawyer-contrived argument that the enormous and ever-increasing expenses VW incurred in the distribution of air conditioners were, in some unexplained manner, "in the nature of fixed costs" or overhead and that gross profits can, therefore, be awarded as representing net profits (Pet. 21 citing *Distillers Distributing Corp., supra*). This argument is predicated solely on a VW lawyer's attempt to discredit the President's testimony by means of the lawyer's own factually unsupported, non-evidentiary assertion that expenses were such that they would not really eat up anticipated profits (Pet. 21, n. 11). Clearly, a lawyer's statements cannot be used to contradict the factual record. Since VW chose to rely on its lawyer's characterizations rather than competent testimony on specific facts challenging the record, the Ninth Circuit quite properly concluded, "VW has failed to point to any evidence tending to show . . . a genuine issue. . . ." 532 F.2d at 688.

Finally, in an apparent attempt to create a sympathetic environment for yet another appellate review of this failure, VW claims a "square conflict" with *Terrell v. Household Goods Carrier Bureau*, 494 F.2d 16, 23, n.12 (5th Cir. 1974), *cert. dismissed*, 419 U.S. 987 (1974) (Pet. 22). Even a cursory reading of *Terrell* reveals that the court never even contemplated giving a plaintiff damages for "lost profits" if, as was the case here, the record provided no basis whatsoever for recovery of compensable damages. To the contrary, the court in *Terrell* was reviewing a certified public accountant's projected "net profit analysis based on

actual known expense figures and the actual and projected sales figures" adduced by a marketing expert. *Id.* at 16. This analysis showed that, had it not been run out of the market, the plaintiff would have made significant profits in the years for which damages were claimed.[2]

The only analysis made here, that of VW's own President, states that VW would not have done so. Even the most generous court cannot provide "lost profits" where the uncontradictory and sole testimony establishes that there were none. Having chosen not to present evidence to impeach the testimony of its own President, VW cannot be heard to complain here.

III

The Ninth Circuit's Holding That an Antitrust Plaintiff Can Use Actual Sales, Even if Illegally Obtained, as a Basis for Damages Is Consistent With This Court's Mandate That Antitrust Defendants Not Be Permitted to Escape the Effects of Their Proven Wrongs.

For years now, it has been the established policy of this country that an antitrust violator cannot be permitted to avoid accounting for his wrong by pointing an accusing finger back at the plaintiff. As this Court stated in *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 139 (1968):

> *"The plaintiff who reaps the reward of treble damages may be no less morally reprehensible*

---

[2]Since the plaintiff had never actually made a profit, the court insisted that its projection be reasonably based on proven facts but stipulated that if they were, the red ink of plaintiff's history could not be used to limit it to its zero "going concern value" at the time of its demise.

> *than the defendant, but the law encourages his suit to further the overriding public policy in favor of competition.* A more fastidious regard for the relative moral worth of the parties would only result in seriously undermining the usefulness of the private action as a bulwark of antitrust enforcement. And permitting the plaintiff to recover a windfall gain does not encourage continued violations by those in his position since they remain fully subject to civil and criminal penalties for their own illegal conduct." (Citations omitted.) (Emphasis added.)

Petitioners' argument that Calnetics should not be allowed to predicate a damage calculation on its actual sales, because the sales were obtained illegally, overtly turns on a directly conflicting view. It criticizes the Ninth Circuit for having "encouraged" the suit of a morally reprehensible plaintiff (Pet. 27), even though *Perma Life* explicitly rejected this reasoning and even though the Ninth Circuit explicitly noted that "Calnetics is not itself immune from liability" for its separate commercial wrongs. 532 F.2d at 689.

Admittedly, petitioners try to distinguish their argument from the *in pari delicto* and "unclean hands" defenses discredited by *Perma Life* and its progeny,[3] but they do so by retreating to earlier authorities that *Perma Life* necessarily superseded and by develop-

[3]*E.g., Semke v. Enid Automobile Dealers Ass'n,* 456 F.2d 1361 (10th Cir. 1972); *Adolph Coors Co. v. A&S Wholesalers, Inc.,* 1975-1 Trade Cas. ¶60,187 (D. Colo. 1975); *Purex Corp. v. General Foods Corp.,* 318 F.Supp. 322 (C.D. Cal. 1970).

ing a conceptualistic distinction that is different only in semantic form from the defenses invoked in *Perma Life* and the cases following it (Pet. 23-26).

Thus, petitioners assert that the measure of Calnetics' damages must be the difference between what did happen as a result of their restraint and what would have happened in a 100% pure, competitive market (Pet. 23-24). But it is clear from *Perma Life, supra,* that and the cases under it, that the proper measure of damages is the difference between what did happen as a result of defendants' restraint and what would have happened in the absence of *that restraint*. Indeed, this is nothing more than an expression of the familiar "but for" rule of tort liability and the principle that one takes his victim as he finds him.

Petitioners also assert that *Perma Life* and its progeny deal only with standing while their argument deals with proof of damages. But virtually any *in pari delicto* or unclean hands argument can be constructed in this way. For example, the argument in *Semke v. Enid Automobile Dealers Ass'n,* 456 F.2d 1361 (10th Cir. 1972), that the plaintiff should not be allowed to recover damages because, having failed to obtain a state license, his whole business "operation" was illegal could just as easily have been framed as an argument, that his separate commercial wrong rendered each of his sales illegal, and hence inadmissible to prove damages. Whether argued in terms of standing or terms of damage evidence, the facts are the same. The results—preclusion of a plaintiff's recovery and exonera-

tion of the defendant—are the same. Only the dialectics are different. Most importantly, since this kind of game can be played with any plaintiff's ethics, the net effect of the petitioners' approach would be to seriously undermine *Perma Life* and, with it, the usefulness of the private antitrust action. Therefore, as the Ninth Circuit aptly recognized:

> "Labels, however, are not controlling, and we find no legitimate reason for distinguishing defendants' 'illegal sales' argument from the *in pari delicto* type of defense struck down in *Perma Life*." 532 F.2d at 689.

IV

In View of Conflicting Evidence on Calnetics' Section 7 Claim as to the Reasons Why Calnetics Was Terminated at a Supplier of Air Conditioners for Volkswagens, the Ninth Circuit Properly Reversed a Directed Verdict Based on an Asserted Lack of Causal Nexus Between VW's Acquisition of VPC and the Termination of Calnetics.

The established standard for a review of a directed verdict is that the evidence, including all reasonable inferences of fact, must be viewed in the light most favorable to the party against whom the verdict was made. *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 694 (1962).

Were VW to meet this standard, it would have to grapple with the evidence, detailed above, that: VPI's decision to buy Calnetics' air conditioners preceded any commission agreement and was precipitated by the expectation that Calnetics' units would outperform the disastrously defective Delanair units; that even VW thought Calnetics' units were superior to Delanair's; that VW pursued one brand of philosophy and, therefore, denigrated Calnetics and its products; that VW enjoyed a special position of power by virtue of its franchisor/supplier relationship with distributors such as VPI; that VPI was satisfied with its ouside suppliers until after VW acquired Delanair, infused it with VW money and personnel and subjected distributors to a barrage of pressures to buy in house; that VW and VPC obtained VPI's promise to join their marketing efforts after which VPI cancelled orders with Calnetics; that VPC's units, considered unfit when marketed under the name Delanair, made substantial inroads into the sales areas in which competitors had been growing; that competitors who made no alleged "bribes" were also cut back or excluded from the market after VPC was put "back on the track" by its deep pocket parent; and that VPC quickly attained an incipient, if not complete, monopoly.

But VW does not face this evidence. Instead, it views the evidence most favorably to itself. It ignores every item of this evidence that Calnetics' loss of sales resulted from the lessened competition and incipient monopoly effects of the acquisition. It ignores the Ninth Circuit's listing and discussion of undisputed evidence suggesting that the ouster of Calnetics was a direct by-product of a conspiracy to restrain trade. 532 F.2d at 682-85. It then erroneously asserts that "Calnetics

offered no evidence" of an injury causally related to VW's acquisition of VPC or to the anticompetitive effects thereof (Pet. 29).

Thus eliminating the negative, VW accentuates the positive by presenting as established fact its current theory that Calnetics only obtained sales to VPI as a result of the commissions to Christiansen's corporation and that it lost the sales because Christiansen was dismissed from VPI's employ (Pet. 27-28).

By framing its argument in this one-sided fashion, VW effectively proves the propriety of the Ninth Circuit's ruling. There are at least two theories as to the cause in fact of the ouster of Calnetics and, on the present state of the records, neither is so remote that a jury could not reasonably believe it and neither so unimpeachable that a jury could not reasonably doubt it.

Moreover, the circuit court's concern that the parties' conflicting causation arguments be resolved by a jury cannot fairly be read as an endorsement of the view that a Section 7 plaintiff can recover damages without proving the fact of causally related injury or that VW will be liable for every business casualty that followed its acquisition of VPC (Pet. 25-26), for the court clearly indicated that Calnetics must prove "damages resulting from the acquisition" and "the fact, if it is a fact" of unlawful market foreclosure. 532 F.2d at 685. The court merely did what it was compelled to do in the face of a major factual dispute, remand the matter for trial.

Conclusion.

For the foregoing reasons, respondents respectfully submit that the Petition should be denied.

Dated: October 13, 1976.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

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Petitioners,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITIONERS' REPLY BRIEF

The brief in opposition is replete with erroneous assertions of fact. We do not believe, however, that the attention of this Court should be diverted to the resolution of factual issues. Whether the pleadings of the opposing parties are supported by evidence; whether petitioners' or respondents' version of the facts is correct — these are for the trier of fact in the district court to determine, not this Court. Contrary to respondents' assertions, the petition for certiorari presents questions of law, not fact. It seeks review by this Court of the rulings of law of the Court of Appeals because those rulings, affirming summary judgment against petitioners, deny them the right to have the factual issues determined in the district court.

I.

Respondents err in stating that, "*on the basis of the facts* developed in the case,"[1] there was "nothing more than a claim of commercial bribery . . . ."[2] First, the facts were not "developed" below since VW's counterclaim was summarily dismissed before trial for legal insufficiency. The factual record is thus governed by the allegations in the counterclaim, which for purposes of summary judgment are assumed to be true. *See, e.g., California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 515 (1972). Second, the express terms of the counterclaim allege a restraint of trade including, *but not limited to*, commercial bribery. Both respondents and the Court of Appeals have inaccurately characterized this case as involving nothing more than a solitary incident of commercial bribery.[3]

As the text of the counterclaim shows,[4] the allegation of commercial bribery was specifically "tied to claims of other acts tending to restrain trade."[5] Indeed, it was only one of four separate acts which petitioners claimed were carried out in furtherance of an illegal conspiracy to restrain and monopolize interstate trade and commerce in the distribution and sale of air conditioning systems for Volkswagen and Porsche automobiles in the Southwest.[6]

[1] Brief in Opp. 9 (emphasis in original).

[2] *Id.* at 9-10.

[3] *See id.* at 9-12; Pet. App. 92a n.20.

[4] Pet. App. 115a-20a.

[5] Pet. App. 92a n.20.

[6] The relevant text reads:

> 11. Beginning some time in or about 1968, the exact date being presently unknown to cross-claimants, and continuing through and including the year 1970, cross-defendants and other co-conspirators presently unknown to

(continued)

Other acts alleged are: (1) a contract under which VPI would purchase "exclusively" from Calnetics;[7] (2) the

[6] (continued)

> cross-claimants, contracted, combined and conspired between and among themselves to restrain interstate trade and commerce and attempted to monopolize trade and commerce in the distribution and sale of air conditioning systems for Volkwagen and Porsche automobiles in Southern California, Arizona, Southern Nevada and Hawaii, in violation of Sections 1 and 2 of the Sherman Act.
>
> 12. In furtherance of said contracts, combination and conspiracy, cross-defendants and each of them, together with co-conspirators presently unknown to cross-claimants, entered into a plan and program to interfere with, impair and eliminate cross-claimants as competitors in the aforesaid interstate trade and commerce in Southern California, Arizona, Southern Nevada and Hawaii and to attempt to monopolize said interstate trade and commerce in said areas. More particularly cross-defendants and each of them together with co-conspirators presently unknown to cross-claimants performed numerous acts to prevent and foreclose cross-claimants from selling air conditioning systems to VPI and dealers in Volkswagen and Porsche automobiles in Southern California, Arizona, Southern Nevada and Hawaii . . . . [Pet. App. 117a-18a.]

The allegation of commercial bribery reads:

> (b) CALNETICS bribed CHRISTENSEN, BALLINGAL and other employees of VPI, whose names are presently unknown to cross-claimants, to use their position at VPI to induce VPI and VPI dealers to purchase all or substantially all of their air conditioning system requirements from CALNETICS to the exclusion of all other manufacturers and distributors of such air conditioning systems, including cross-claimants. [Pet. App. 118a-19a.]

[7] (a) R.W.C. SALES, CHRISTENSEN and BALLINGAL entered into a contract with CALNETICS, whereby CHRISTENSEN and BALLINGAL agreed, during the period of their employment by VPI, to cause VPI to purchase all or substantialiy all of its air conditioning system requirements

(continued)

"dissemination of false and misleading information" regarding the air conditioners sold by VW;[8] and (3) the wrongful "inducement" of VPI to promote and sell exclusively Calnetics' products without regard to their merits.[9] Notwithstanding the court's narrow characterization of its holdings, the dismissal of VW's counterclaim necessarily rested on the view that the presence of commercial bribery automatically excludes the application of the Sherman Act to restraints of trade that are accomplished by, or accompany, such bribery. Certiorari is appropriate to determine whether this decision fashions an immunity under the Sherman Act for a form of anticompetitive conduct, all too common in recent years, that does violence to the statute and settled precedents of this Court.

---

[7] (continued)

from CALNETICS to the exclusion of all other manufacturers and distributors of such air conditioning systems, including cross-claimants. [Pet. App. 118a.]

[8] (c) Cross-defendants caused the dissemination of false and misleading information regarding the relative merits of the air conditioning systems manufactured by CALNETICS and those manufactured by VWP [VPC] to induce VPI and VPI dealers not to purchase VWP's air conditioning systems from VWP or VWA. [Pet. App. 119a.]

[9] (d) Cross-defendants induced VPI and VPI dealers to promote the sale of CALNETICS' air conditioning systems without regard to their merits and induced VPI to purchase and become an exclusive distributor of such air conditioning systems to the exclusion of all other air conditioning systems, including those manufactured by VWP, when in fact CALNETICS' products were defective and could not fairly compete on their merits with cross-claimant's air conditioning systems. [Pet. App. 119a.]

II.

The alternative basis for the summary dismissal of VW's counterclaims, also affirmed by the Court of Appeals, rests entirely on a single deposition statement of VW's president that VW had made no profits on its subsidiary's air conditioning units.[10] To conclude that VW could prove no damages resulting from the diversion of VPI's air conditioner purchases to Calnetics, it was necessary for the lower courts to infer from the absence of profit that the diverted sales, had they gone to VW, would have failed to produce profits or, at a minimum, would have failed to reduce VW's actual losses. By drawing inferences favorable to the party seeking summary judgment rather than to the party resisting summary judgment — itself contrary to settled law[11] — the Court of Appeals has adopted a blanket rule precluding antitrust plaintiffs from recovering damages if their operations have not yet achieved profitability. This principle conflicts with the Fifth Circuit's rule in *Terrell v. Household Goods Carriers' Bureau*, 494 F.2d 16 (5th Cir.), *cert. dismissed*, 419 U.S. 987 (1974), that the absence of profits will not defeat antitrust recovery.

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[10] Respondents inaccurately state that "VW's President testified on several occasions that the distribution of air conditioners was not a profitable business . . . ." Brief in Opp. 13. The only statement in the record relating to the profitability of VW's air conditioner sales is Mr. Perkins' deposition testimony that VW's expenses ate up the profit from the resale of its subsidiary's air conditioners (R.1448). As pointed out in the petition for certiorari, the expenses referred to were in the nature of fixed costs. Pet. 20 n. 10, 21. It should be emphasized that Mr. Perkins is not an accountant and that he was offering no projections of financial performance under hypothetical circumstances (R. 1447-49). The testimony referred solely to actual profitability during the startup period immediately following VW's acquisition of Delanair. This was also the period during which Calnetics was bribing VPI's key employee and VPI's purchases had been shifted from VW to Calnetics.

[11] Adickes v. Kress & Co., 398 U.S. 144, 158-59 (1970), *quoting* United States v. Diebold, Inc., 369 U.S. 654, 655 (1962).

Respondents correctly point out that in *Terrell* the court had before it elaborate net profit projections introduced at trial. Brief in Opp. 14-15. But that merely underscores the error in this case, because the court's holding below deprived VW of the opportunity of a trial where a comparable analysis might have been offered. The conflict between the Fifth and Ninth Circuits is over the correct rule of law to be applied when an antitrust plaintiff cannot show that existing operations are profitable. The fact that the Ninth Circuit formulated its rule on a summary record rather than after full trial compounds the error, not, as respondents urge, eliminates it.

III.

Contrary to the broadbrush reading of *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968), advanced in the brief in opposition (pp. 15-18), the Court in that case carefully distinguished between the right of an antitrust plaintiff to bring a private antitrust action when he is also at fault and his right to recover for damages attributable to his own misconduct. This basic distinction between standing and computation of damages was expressly recognized in Mr. Justice Black's opinion for the Court:

> The possible beneficial byproducts of a restriction from a plaintiff's point of view *can of course be taken into consideration in computing damages*, but once it is shown that the plaintiff did not aggressively support and further the monopolistic scheme as a necessary part and parcel of it, his understandable attempts to make the best of a bad situation should not be a ground for *completely denying him the right to recover* which the antitrust acts give him. [*Id.* at 140; emphasis supplied.]

The crucial fact in this case is that Calnetics offered no evidence in the Section 7 trial to support its damage claim other than so-called expert testimony of projections based on "optimism." *See* Pet. 24 n.13. Unlike other antitrust plaintiffs, Calnetics could not establish its damages under one of several acceptable methods of proof because it had no market history in the business of selling air conditioning systems for Volkswagen and Porsche automobiles other than the sales generated by the bribery scheme. Pet. App. 18a. On remand, the question of the nexus between the bribery scheme and Calnetics' sales to VPI will be subject to determination by the trier of fact. The legal question before this Court and appropriate for resolution prior to retrial is whether the Court of Appeals correctly held that if those sales are found to have resulted from the commercial bribe, such sales can provide the sole basis for measuring Calnetics' damages, assuming that its subsequent loss of VPI's business can be shown to be the result of any alleged lessening of competition flowing from VW's acquisition of Delanair.

Certiorari is appropriate, therefore, to determine whether the Ninth Circuit improperly extended *Perma Life* beyond its intended scope, and to assure that on remand Calnetics will not receive a recovery inflated by reason of its own misconduct.

IV.

The petition for certiorari (pp. 27-30) raises the question whether the Ninth Circuit, like the Third Circuit in the pending *Brunswick* case (No. 75-904),[12] applied an improper standard of proof of causation in a private Section 7

[12] NBO Indus. Treadway Cos. v. Brunswick Corp., 523 F.2d 262 (3d Cir. 1975), *cert. granted sub nom.*, Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 424 U.S. 908 (1976).

damage action. Under that standard, it is unnecessary to show, as the Second Circuit requires, that the plaintiff's alleged damages were "the economic result of the *anti-competitive* effects" of the acquisition. *GAF Corp. v. Circle Floor. Co.*, 463 F.2d 752, 759 (2d Cir. 1972), *cert. dismissed*, 413 U.S. 901 (1973) (emphasis in original).

The only effect of VW's acquisition of Delanair was that the latter's status changed from that of a captive independent supplier to a subsidiary. Neither in theory nor in fact did such change in the character of Delanair restrict or otherwise affect the competitive opportunities of Calnetics and other sellers of air conditioners. The brief in opposition (pp. 18-19) lists a number of disputed items of evidence showing, at most, only that Calnetics' alleged injury occurred after VW's acquisition of Delanair, and not that it was causally related to any lessening of competition caused by the acquisition. If such evidence were again to be presented on remand, petitioners will refute it. The point here, however, is that even if accepted by the trier of fact in the district court, it would not meet the proper standard of causality proof required of a Section 7 private plaintiff by Section 4 of the Clayton Act, 15 U.S.C. §15. Certiorari is appropriate, therefore, to assure that the improper standard announced by the court below will be reversed and not govern the trial on remand.

CONCLUSION

The petition for certiorari should be granted.

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